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No more important decision has been rendered for a long time, than that recently announced by the Supreme Court of the United States in the action brought by the federal government against the Trans-Missouri Freight Association, in which that tribunal sustains what is known as the Sherman anti-trust law and holds that it, in effect, forbids all pooling arrangements by railroad corporations. The case arose upon a bill brought by the government to have set aside and declared void the agreement of the association, which was signed by some eighteen railroad companies, "for the purpose of mutual protection," by the establishment and maintenance of "reasonable rates, rules and regulations on all freight traffics, both through and local." The government charged in its bill that the defendants were "engaged in an unlawful combination and conspiracy of great injury and grievous prejudice to the common good and the welfare of the people of the United States." The bill originally brought in the United States Circuit Court for the District of Kansas, was dismissed by that court and the action of that court was affirmed by the Circuit Court of Appeals for the Eighth Circuit. Both decisions have now been overruled by the Supreme Court. The opinion of the court was by Mr. Justice Peckham, concurred in by Chief Justice Fuller and Associate Justices Brewer, Harlan and Brown. Four of the justices, viz., White, Shiras, Field and Gray dissented.

The court said at the outset that to exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave very little for the anti-trust law to take effect upon, and that is the act by which the legality or the illegality of the agreement is to be determined. The interstate commerce law, the court says, does not authorize an agreement like that in question. It may not in terms prohibit it, but it is far from conferring, either directly or indirectly, any authority to make it. Continuing, the court says that it sees nothing in contemporaneous history, in the legal situation at the time of the passage of the statute, in its legislative history, or in any general difference, in nature or kind, of trading or manufacturing companies from railroad companies, which would lead to the conclusion that congress, in prohibiting the making of contracts in restraint of trade, intended to exclude railroads from the operation of the act. The act, the court goes on, prohibits contracts, combinations, etc., in restraint of trade or commerce. Transporting commodities is commerce, and if from one State to or through another it is interstate commerce, and, therefore, contracts relating to either or both subjects are included so long as they relate to trade which is either interstate or foreign. While the act prohibits all combinations in restraint of trade, the limitation is not confined to that form alone. Nor should it be held that the act excepts contracts which are not in unreasonable restraint of trade and which only keep up rates to a reasonable price. This would be the reading into the act by the way of judicial legislation of an exception not placed there by the law-making branch of the government.

Further on the court asks, why should not a railroad be included in general legislation aimed at the prevention of that kind of agreement made in restraint of trade which may exist in all companies and which tends very much to the same results, whether put in practice by a trading and manufacturing company or by a railroad company. It is true, the court says, that the results of trusts may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest. It is admitted that business or trading combinations may temporarily, or perhaps even permanently, reduce the price of an article traded in or manufactured by reducing the expense inseparable from the running of many different companies for the same purpose, but trade or commerce may, nevertheless, be badly and unfortunately restrained by driving out of business the small dealers whose lives have been spent therein, and who might be enabled to readjust themselves to their altered surroundings. A mere reduction

in the price of the commodity dealt in might, the court suggests, be dearly purchased by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital.

It is, in fact, the court says, not material that the price of an article may be lowered, for it is in the power of the combination to raise it. It is not, according to the court, for the real prosperity of any country that such changes should occur as result in transferring an independent business man, the head of his establishment, small though it may be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Finally, the court says, it is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business, but when the evil to be remedied is similar in both kinds of corporations, such as contracts unquestionably in restraint of trade, there is no reason why similar rules should not be promulgated in regard to both.

Notwithstanding that the opinion of the court will probably be endorsed by a majority of the profession, there are many who believe that the dissenting judges are right in their main contention as expressed in the dissenting opinion of Mr. Justice White—in the contention that congress did not intend to prohibit reasonable contracts and agreements. It is admitted by the minority judges that originally all contracts which in any degree restrained trade were illegal. But it is pointed out that as trade developed it came to be understood that the rigid prohibition of all contracts and combinations in restraint of trade would tend to destroy both the freedom of contract and trade itself. Hence, from the very reason of things, arose that distinction under which contracts only partially restraining trade were held to be legitimate. It was this conception which led to the adoption, by the common law judges, of reason as the criterion by which it was to be determined whether a contract which in some measure restrained trade was, when considered in all its aspects, a contract of that character, or whether it was one which was necessary in the interest of trade itself. "To define, then, the words 'in restraint of trade' as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade and therefore nothing to restrain." The minority judges quote the following clear statement from a leading book and indorse it as the precise expression of the undoubted American and English rule. "The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed respecting agreements in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more by exceptions and qualifications, and a gradual change has taken place, brought about by the growth of industrial activities and the enlargement of commercial facilities."

To uphold this view the minority judges point to the title of the act which reads "to protect trade and commerce against unlawful restraints and monopolies." Does not, they ask, the word "unlawful" clearly distinguish between contracts in restraint of trade which are lawful and contracts which are not. If all contracts in restraint of trade are unlawful under the act, is it not absurd to speak of unlawful contracts, thus carrying the implication that there are contracts which lawfully restrain trade? True, the title of an act does not absolutely control it and cannot be used to destroy the plain import of the language found in its body, yet when a literal interpretation will work out wrong or injury, or when the language is ambiguous, the title may be resorted to as a guide to construction. Further, the minority point out that there is no canon of interpretation which requires that the letter be followed when by so doing an unreasonable result is accomplished. On the contrary, the rule is the other way. It exacts that the spirit which vivifies, not the letter which kills, shall be the guide to correct interpretation. The supreme court has repeatedly held that the intention of the lawmaker is the law, and statutes should receive a sensible construction, such as will effectuate the legislative intent, and, if possible,

avoid an unjust and absurd conclusion. This principle leads the minority judges to proceed to inquire into the actual intention and significance of the anti-trust law. What, it asks, was the purpose of congress in passing it? It was to protect the liberty of contract and the freedom of trade. But if the rule of reason no longer determines the propriety of a contract the rights of the citizen become subject to the mere caprice of judicial authority. Instead of shielding the many against the conspiracies of a few the law as interpreted strikes down the interests of the many to the advantage of a few. If all reasonable contracts are illegal, if they have the least tendency to restrain trade, what becomes of the right of workmen to combine for self-protection? It has been repeatedly held that the law applies to combinations of workmen, but so long as the rule of reason was followed by the courts such labor organizations as respected the ordinary rights of employers and fellow-workmen were safe from interference. Under the common law definition of restraint of trade, labor unions for mutual protection which exist to maintain rates and wages and reduce hours of toil are perfectly legitimate. But, in view of the ruling of the supreme court in the present case that even reasonable agreements partially restraining trade are unlawful, it is impossible to escape the conclusion that peaceable associations of workmen have become impossible.

NOTES OF RECENT DECISIONS.

ARCHITECT — COMPENSATION. — The Supreme Judicial Court of Maine, in the case of Coombs v. Beede, 36 Atl. Rep. 104, has lately rendered a most valuable decision with regard to the rights of an architect, specially employed, whose plans prove unavailable through an honest mistake of judgment on his part. The court below charged that if the architect was expressly told that the cost of the house designed must not exceed a certain sum, he should either have made plans accordingly, or frankly told his employer that he could not do it, and have declined to do it, and that if he undertook the commission with that specific restriction, he could not recover any compensation, in case the plans called for a house of greater cost. But the Supreme Judicial Court granted a new trial on the ground that this instruction was erroneous, Peters, C. J., defining the rights and duties of the architect as follows: "We must bear in mind that the plaintiff was not a contractor who had entered into an agreement to construct a house for the defendant, but was merely an agent of the defendant to assist him in building one. The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon any one to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case, his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life."

PLEDGE — COLLATERAL SECURITY—APPROPRIATION OF PAYMENT.—In Blackmore v. Granberry, 39 S. W. Rep. 229, decided by the Supreme Court of Tennessee, it was held that where parties have made no application of the proceeds of collateral security, pledged for the indebtedness of the pledgor generally, and the oldest debt is also one on which there is a surety, a court of equity will make an application to such debt in relief of the surety. The following is from the opinion of the court:

In the case of U. S. v. Kirkpatrick, 9 Wheat. 720, the Supreme Court of the United States . . . Judge Story, delivering the opinion of the court, said: "The general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments. If he omits it, the creditor may make it. If both omit it, the law will apply the payments, according to its own notions of justice." And in that case the payments were applied to extinguish the debts accord-

ing to priority of time. The authorities are conflicting upon this matter of the application of payments, some of them holding that the application must be made in the interest of the creditor to the most precarious debt, as in Field v. Holland, 6 Cranch, 8, and Standford Bank v. Benedict, 15 Conn. 437; and this is the doctrine of the common law on this subject. The current of authority is to apply the rule as stated by Mr. Story. See Pickering v. Day, 95 Am. Dec. 291; White v. Trumbull, 29 Am. Dec. 687; Smith v. Loyd, 37 Am. Dec. 623, and note. And this is the doctrine of the Roman or civil law in such cases, and our own authorities are in accord with this civil law rule. Bussey v. Grant's Admr., 10 Humph. 238; Mason v. Smith, 11 Lea, 67; Fulton v. Davidson, 3 Heisk. 648; Lippman v. Boals, 84 Tenn. 283. In the leading case of Bussey v. Grant's Admr., 10 Humph. 238, reference is made to Pattison v. Hull, 9 Cow. 747, and note, where the cases are reviewed and many citations are made to English cases, where, as in our State, the civil rule is followed. Among other cases is cited Marryatts v. White, 2 Starkie, 101, to the effect that payments will be applied to discharge debts for which a surety is bound, rather than to one where the debtor has given no surety, on the principle that the debtor's honor is more concerned in debts on which he has given surety than in those where he alone is bound; and to an old debt before a new one. Plomer v. Long, 1 Starkie, 153. In Story, Eq. Jur. sec. 459c, it is said: "The application ought rather to be made to the debt for which the debtor has given security than to those which he owed singly, because thereby the debtor discharges two obligations to his creditors, to-wit, his principal and his surety, whom he is obliged to indemnify." In the case of Fulton v. Davidson, 3 Heisk. 648, this rule was applied, and the fund was appropriated to the debt on which John S. Fulton had given security, and which was the oldest debt, in preference to younger debts, and on which there were no sureties. The rule is thus stated in Bridenbecker v. Lowell, 32 Barb. 23. "Pothier lays down the rule that the application ought to be made to the debt for which the debtor has given sureties, rather than to those he owes singly. The honor of the debtor is concerned in such payment." Citing Story, Eq. Jur. sec. 450c; Marryatts v. White, 2 Starke, 101. In Pennsylvania, where the civil law does not prevail, it is still held that the payment will be made to the oldest debt. In the case of Pardee v. Markle, 111 Pa. St. 555, 5 Atl. Rep. 41, the court say: "The latter rule (to-wit, to apply to the most precarious security) will prevail whenever the interest of the creditor requires that it should, but not to the prejudice of a surety who may insist on an appropriation under the rule first stated (to-wit, the oldest debt), and hold himself bound or discharged accordingly. Berghaus v. Alter, 9 Watts, 386." See, also, Pierce v. Sweet, 33 Pa. St. 151. Mr. Daniel, in his work on Negotiable Instruments (section 1252), says, in effect, that payments will be applied to the unsecured in preference to secured debts, unless the latter are secured by a surety, in which case application will be made for his relief. To the same effect, see Rand. Com. Paper, 1503, 1494; Tied. Com. Paper, 377; Brandt, Sur. 330."

The rule laid down in this case and the authorities cited afford an illustration of the fact that a surety is a special favorite of the law. We do not really see any good reason for the extremes to which this doctrine has been extended. A surety, of course, should not be subjected to any liability beyond the fair and reasonable intendment of the contract into which he entered. On the other hand, he ought not to be afforded the benefit of artificial and technical loopholes of escape from his deliberate and honest obligation. Certainly the rules now existing for the exoneration of sureties have gone as far as they should be carried. The tendency in the near future should be to strictly limit or even curtail their scope.

A distinction should not be lost sight of between the cases above cited, which have the distinctive feature of a single creditor with two debts, one unsecured and the other secured by a surety, and another line of authorities, involving the rights of two creditors one of whom has access to two funds, and the other only to a single fund, for payment. For such cases, Ingalls v. Morgan, 10 N. Y. 179, lays down the anciently established and still equitable rule that "where a creditor has a lien upon two funds for the security of his debt, and another party has an interest in either one of those funds, without any right to resort to the other, in such a case equity will compel the creditor to take his satisfaction out of the fund upon which he alone has an interest, so that both parties may, if possible, escape without injury." A comparatively recent application of such rule to a somewhat peculiar state of facts will be found in McConnell v. Muldoon, 30 Abb. N. C. 352.

WAREHOUSEMEN — CONVERSION.—The Supreme Court of Alabama in Davis v. Hurt, decide that the mere failure of a warehouseman to deliver on demand goods which have been intrusted to him does not support an action of conversion, where the failure is solely because of the goods having unaccountably disappeared; the remedy of the owner being *assumpsit* for breach of contract, or case for negligence. The court says:

Warehousemen are of the class of bailees bound to ordinary diligence, and, of consequence, liable only for losses occurring from the want of ordinary care. When, however, upon demand made, the bailee fails to deliver goods intrusted to his care, or does not account for the failure to make delivery, *prima facie* negligence will be imputed to him; and the burden of proving loss without the want of ordinary care devolves upon him. Seals v. Edmondson, 71 Ala. 509; Prince v. State Fair, 106 Ala. 340, 17 South. Rep. 449; Claflin v. Meyer, 75 N. Y. 260; *Id.*, 31 Am. Rep. 467; Boies v. Railroad Co., 37 Conn. 272; *Id.*, 9 Am. Rep. 347. The rule is founded in necessity, and upon the presumption that a party who, from his situation, has peculiar, if not exclusive, knowledge of facts, if they exist, is best able to prove them. If the bailee to whose possession, control, and care goods are intrusted will not account for the failure or refusal to deliver them on demand of the bailor, the presumption is not violent that he has been wanting in diligence, or that he may have wrongfully converted, or may wrongfully detain them. Or, if there be injury to or loss of them during the bailment, it is but just that he be required to show the circumstances, acquitting himself of the want of diligence it was his duty to bestow. When the bailee fails to return the goods on demand, the principal has an election of remedies. He may sue in *assumpsit* for a breach of the contract, or in case for negligence, or, if there has been a conversion of the goods, in trover for the conversion. Story, Bailm. §§ 191-269; Bank v. Wheeler, 48 N. Y. 492; *Id.*, 8 Am. Rep. 564; Magnin v. Dinsmore, 70 N. Y. 410; *Id.*

26 Am. Rep. 608. The gist of the action of trover is the conversion. The right of property may reside in the plaintiff, entitling him to pursue other remedies, but trover cannot be pursued without evidence of a conversion of the goods. Glaze v. McMillion, 7 Port. 279; Connor v. Allen, 33 Ala. 515; Bolling v. Kirby, 90 Ala. 215, 7 South. Rep. 914. In Conner v. Allen, *supra*, it was said by Rice, C. J.: "Trover is one of the actions the boundaries of which are distinctly marked and carefully preserved by the code. A conversion is now, as it has ever been, the gist of that action; and, without proof of it, the plaintiff cannot recover, whatever else he may prove, or whatever may be his right of recovery in another form of action." And he adopts the definition or description of a conversion given by Mr. Greenleaf: "A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own." 2 Greenl. Ev. § 742. In Glaze v. McMillion, *supra*, it was said: "It is believed that all conversions may be divided into four distinct classes: (1) By a wrongful taking, (2) by an illegal assumption of ownership, (3) by an illegal user or misuser, (4) by a wrongful detention." In Bolling v. Kirby, *supra*, there was a very full examination of the authorities, and discussion of the essential elemenls or facts which must concur to constitute conversion in the sense of the law of trover, by McClellan, J., and the result declared was that "conversion upon which recovery in trover may be had must be a positive, tortious act. Non-feasance, or neglect of legal duty, mere failure to perform an act obligatory by contract, or by which property is lost to the owner, will not support the action." The case is republished, with elaborate and instructive annotation by Mr. Freeman, 24 Am. St. Rep. 789-819. In Railroad Co. v. Kidd, 35 Ala. 209, it was held that "trover will not lie for a bare non-delivery of goods by a warehouseman, unless they are in his possession, and he refuses to deliver them on demand." In Abraham v. Nunn, 42 Ala. 51, it was held that trover would not lie against a warehouseman for the conversion of goods taken from his possession by an armed force, without negligence or complicity on his part. In Bank v. Wheeler, *supra*, the defendant had received for acceptance certain bills of exchange, and, at the demand of the person intrusting them to him, failed to return them, saying he could not find them and might have torn them up with papers he consid. ered of no value. It was held he was not liable in trover, there being no evidence of a voluntary or intentional destruction or loss of the bills; though he was liable upon his implied promise to present the bills for acceptance, and, if not accepted or paid, to give notice to the plaintiff.

Without pursuing further an examination of authorities, it may safely be said that a mere failure by a bailee, on demand made, to deliver goods which have been intrusted to him, is not a conversion which will support an action of trover, if he sets up no title hostile to or inconsistent with the title of the bailor, or has not appropriated them to his own use, or to the use of a third person, or exercised over them a dominion inconsistent with the bailment. All that can be fairly predicated of the facts found in the record is the mere failure to deliver the cotton upon the demand of the plaintiff, possession of it not remaining with the defendant. There was no denial of the title of the plaintiff, nor dominion exercised over the cotton inconsistent with the terms of the bailment; no evidence of a conversion or appropriation of it to their own use or to the use of any third person by the defendants. The failure to deliver, unexplained, raises a presumption of negligence against them, and may involve them in a liability for a breach of the contract of bailment, or for negligence in the performance of the duty springing from the contract; but it is not the conversion—the positive, tortious act—indispensable to maintain trover.

LANDLORD AND TENANT — ALTERATION OF PREMISES—INJURY TO TENANT.—It is decided by the Supreme Court of Illinois in Jefferson v. Jameson & Morse Co., reversing the appellate court, that an owner, who lets the work of altering a building to a competent mechanic, and surrenders entire control of the premises and supervision of the work to him, is not liable for an injury done by the contractor to a tenant who, for a valuable consideration, agreed to the making of the repairs. The court says in part:

In the propositions of law submitted to the court by appellant it was claimed that, where the owner of a building contracts with a competent and experienced mechanic to build additional stories to his building, and turns over the entire work to him, and by reason of the negligence of the contractor or his workmen, or from any other cause, without any fault of the owner, the premises of a tenant in such building is injured, and his goods damaged, the owner is not liable to the tenant for such damage, and his remedy, if he, has any, is against the person causing the damage. The court, however, refused to hold as law the propositions of appellant bearing on the question, but held, under the evidence introduced, the appellant was liable to appellee for all damages sustained. In Scammon v. City of Chicago, 25 Ill. 424, it was held that an owner of land who contracts with a skillful mechanic to erect on the land a building, and surrenders the premises to the contractor, is not answerable in damages for an accident which occurs to a stranger passing by. If the injured party has any recourse, it is against the contractor. In Pfau v. Williamson, 63 Ill. 16, it was again held that, where the owner of a lot contracts with a skillful and competent builder for the erection of a house, and surrenders possession of the property to the builder, and the work is not done under the direction of the owner, and injury results to a third person from the negligence of the contractor, such contractor is not the servant of the owner, and the contractor alone is liable for the injury. In Hale v. Johnson, 80 Ill. 185, it was held that one who contracts to do a certain piece of work, furnishing his own assistants, and executing the work in accordance with the plan previously given him by the person for whom the work is done, without being subject to the orders of the owner in respect to the details of the work, is a contractor, and not a servant, and a person injured through the negligence of the contractor could not recover against the owner. The same rule has been adopted in other States. Morton v. Thurber, 85 N. Y. 550; Hilliard v. Richardson, 3 Gray, 349; Forsyth v. Hooper, 11 Allen, 419; Lawrence v. Shipman, 39 Conn. 586. Where the owner employs a mechanic, and sets him to work in repairing a building, or in

the construction of a new building, and furnishes the material to be used, and retains direction of and control over details of the work and the men employed in the work, in such case the mechanic would be the mere servant of the owner, and the owner would be liable for the negligence of the servant. But where the contractor is given the entire possession of the building where the work is being constructed, uses his own means and methods for accomplishing the work, and is not under the immediate control of the employer, but works under a plan adopted before he contracted to perform the work, he occupies the position of contractor, and the employer will not be responsible for damages resulting from his negligence. Morgan v. Smith, 159 Mass. 570, 35 N. E. Rep. 101. Here it appears from the evidence appellant let the work of repairing the building to a competent and experienced mechanic, and gave him entire control over the building, and surrendered all supervision and direction over the manner of doing the work to the mechanic. Indeed, after the contract for the repairs was made, appellant had nothing whatever to do with the building or the work, but its entire management and control was in the hands of the contractor. Under such circumstances appellant was not liable, and the court erred in refusing the propositions of law submitted by him on this branch of the case. The fact that appellee was a tenant of appellant, occupying the building where the repairs were made, does not, in our opinion, make this case an exception to the general rule heretofore announced. Appellee contracted in writing with appellant, for a certain consideration therein expressed, that the improvement or repairs might be made. Having agreed that the repairs might be made, he occupies no better position, so far as his right to recover damages is concerned, than a stranger. In other words, after appellee contracted that the work might be done, he and appellant, so far as the work was concerned, occupied the position of strangers to each other. If appellant had gone on and employed mechanics, and done the work himself, and damages had resulted through the negligence of his servants, he would be liable. But, on the other hand, if he saw proper to let the contract to a contractor, and surrender the possession of the property to him, and give him the entire supervision and control of the work in all its details, if damages resulted through the negligence of the contractor, he alone would be liable for such damages. The judgment of the circuit and appellate courts will be reversed, and the cause remanded to the circuit court.

WHAT CONSTITUTES A BROKER.

It often becomes quite an important question in modern litigation, to determine whether a particular functionary constitutes a broker, or some other kind of agent, or perhaps is a principal, or occupies some different relation altogether to the transaction. Hence the need and advantage of considering, especially, as in the present article, in the light of recent decisions not hitherto collected, the exact scope and correct definition of the term "broker," the features which mark such a functionary, and like matters.

Meaning of Term "Broker."—A broker, as the term is ordinarily used in its broadest sense, is a species of agent, employed as an intermediary in the transaction of affairs for others.[1] He usually receives a compensation which is called "brokerage,"[2] and which is often in the shape of a "commission" or percentage reckoned on the amount involved.[3] The term "brokerage" is also applied, however, to the occupation of a broker rather than to his compensation.[4]

Expansion of Scope of Term.—Most of the definitions of a broker are not sufficiently comprehensive to cover all classes of brokers, but are especially confined to commercial brokers or brokers for sale. Yet the mere effecting of a sale forms but a part of the present functions of a broker, which are now extended[5] to almost every branch of business and phase of commercial affairs. Nor are the operations of brokers confined to commercial affairs in the stricter sense of the phrase, but extend to transfers of real property[6] as well as of personal property, disconnected with business transactions, to transactions concerning professional matters, and, in fact, to a variety of matters besides the bargains and contracts which he is most usually represented as negotiating.

Too Restricted Definitions of a Broker.—The earliest definition of the term "broker" confine the employment of brokers to dealings among merchants, and appear to limit this view, as was at one time appropriate,[7] to merchandise and exchange brokers, meaning by the latter what we would call money

[1] The fact that a broker is an agent, and an intermediate agent, appears from the following cases collectively considered: Haas v. Ruston, Ind. App. (1895) 42 N. E. Rep. 298, 301, 42 Cent. L. J. 109; Galigher v. Jones, 129 U. S. 193, 198 (1888), 32 Lawy. Co. Op. Ed. 658, 660, 9 Sup. Ct. Rep. 335, 336, 28 Cent. L. J. 374; Warren v. Shook, 91 U. S. 704, 710, 23 Lawy. Co. Op. Ed. 421, 423; Morgan v. Jaudon, 40 How. Pr. 366, 378. Concerning the derivation of the term, see Webster's International Dict. tit. "Broker;" Century Dict. tit. "Broker," vol. 1, p. 692; Milford v. Hughes, 16 Mees. & W. 174.

[2] See Saladin v. Mitchell, 45 Ill. 79, 83.

[3] See Shepperd v. Hedden, 5 Dutch. 334, 340; City of Portland v. O'Neill, 1 Oreg. 218, 219; Pott v. Turner, 9 Bing. 702, 706, 19 Eng. Com. Law, 316, 317; Saladin v. Mitchell, 45 Ill. App. 79, 83.

[4] See Haas v. Ruston, Ind. App. (1895) 42 N. E. Rep. 298, 301, 42 Cent. L. J. 109.

[5] City of Little Rock v. Barton, 33 Ark. 436, 447-48.

[6] See City of Little Rock v. Barton, *supra*.

[7] Turner, S. J., in City of Little Rock v. Barton, 33 Ark. 436, at p. 445; Burrill's Law Dict. tit. "Broker," 2d Ed. 229-30.

brokers, or money and exchange brokers.[8] While such definitions have been properly regarded by modern writers as too limited to include the various classes of brokers recognized at the present day,[9] yet there is quite a modern English case[10] which gives support to such an obsolete position. Nor, as has been indicated, is there a sufficient extension of the scope of broker's functions made by these definitions which allow his operations to cover matters of "trade, commerce, and navigation."[11] Some definitions even limit the range of his negotiations to sales,[12] which, of course is not objectionable where the definition purports[13] to be simply that of a broker for sale. Another restricted view of a broker confines his functions to the making of bargains,[14] while sometimes bargains and sales are mentioned in such a connection. Still too restricted are likewise those definitions which extend the scope of the broker's functions to contracts,[15] or to bargains and contracts.[16] Nor can sufficient breadth be accorded to the definition of a broker which makes the transfer of property the object of his efforts,[17] or even to that which speaks of him[18] as employed to "negotiate" a matter between two parties, since the word "negotiate" might be thought to cover a business transaction only.

Distinguishing Characteristics of Brokers.—Two peculiarities are often said to mark out a broker from those functionaries who most resemble him. In the first place, he takes no possession, as broker, of the subject-matter of the negotiation or transaction.[19] In this way he is especially distinguished from a factor, whom we are now more apt to call a commission merchant.[20] In the next place, he generally contracts or acts in the name of those who employ him, and not in his own.[21] Yet it is not at all uncommon for a broker to act in his own name for an undisclosed principal; though his want of right to do so has also been made the basis of distinguishing him from a factor.[22] These distinguishing characteristics just mentioned are sometimes embodied, wholly or in part, in definitions of a broker.[23] But the chief feature which distinguishes a broker from other classes of agents is that he is a mere intermediary ,middleman or go between,[24] and consummates his negotiation or efforts as, in a certain sense, the agent of both parties to the transaction.[25] True, he is, as a rule, especially precluded from acting as the representative of both parties,[26] and at the outset of his dealings he is usually especially employed as the agent of one of the parties; but in bringing about an arrangement between the parties he is the agent of both. It may further aid in fixing the general nature of a broker's functions to say, with an American court in a recent

[8] See 5 Comyns' Dig. 78; Stat. 1 Jac. 1, ch. 21.

[9] See Burrell's Law Dict. tit. "Broker," 2d Ed. 229-30, quoted in City of Little Rock v. Barton, 33 Ark. 436, at p. 445.

[10] Milford v. Hughes, 16 Mees. & W. 174, 177 (1846).

[11] See, for definitions using some or all of these terms, Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, at p. 381, 38 Am. Rep. 441, at p. 443; Brett, J., dissenting in Fowler v. Hollins, L. R. 7 Q. B. 616, at p. 623, 3 Moak's Eng. Rep. 232, at p. 238; Haas v. Ruston, Ind. App. (1895) 42 N. E. Rep. 298, 301, 42 Cent. L. J. 109; Saladin v. Mitchell, 45 Ill. 79, 83.

[12] Morgan v. Jaudon, 40 How. Pr. 366, 378; Shepperd v. Hedden. 5 Dutch. 334, 340. See, also, Fairly v. Wappoo Mills (S. Car.) (1895) 22 S. E. Rep. 108, 112, 29 Lawy. Rep. Ann. 215, 219.

[13] As in Mallett v. Robinson, L. R. 7 Com. Pl. 84, 97, 1 Moak's Eng. Rep. 335, 358.

[14] See Pott v. Turner, 6 Bing. 702, 706; Saladin v. Mitchell, 45 Ill. 79, 83; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 381, 38 Am. Rep. 441, 443.

[15] See Braun v. City of Chicago, 110 Ill. 186, 194-95; Haas v. Ruston, Ind. App. (1895) 42 N. E. Rep. 298, 301, 42 Cent. L. J. 109.

[16] See Brett, J., dissenting in Fowler v. Hollins L. R. 7 Q. B. 616, at p. 623, 3 Moak's Eng. Rep. 232, at p. 238; Saladin v. Mitchell, 45 Ill. 79, 83. Compare Hamberger v. Marcus, 157 Pa. St. 133, 138, 38 Cent. L. J. 238.

[17] As in Wilkes v. Ellis, 2 H. Blackst. 555, 556.

[18] As in La. Revised Civ. Code, art. 3016. See Fete v. Lanaux, 45 La. Ann. 1343, 1346, 14 South. Rep. 241, 243.

[19] See Haas v. Ruston, Ind. App. (1895) 42 N. E. Rep. 298, 301, 302, 42 Cent. L. J. 109; Harley v. City of Hot Springs (Ark.), 11 S. W. Rep. 694; Saladin v. Mitchell, 45 Ill. 79 83.

[20] See Haas v. Ruston, *supra*; remarks of Holbroyd, J., in Baring v. Corrie, 2 Barn. & Ald. 137, at p. 148, 2 Eng. Ruling Cas. 391, 397.

[21] See Haas v. Ruston, Ind. App. (1895) 42 N. E. Rep. 298, 301, 302, 42 Cent. L. J. 109; Saladin v. Mitchell, 45 Ill. 79, 83.

[22] See Haas v. Ruston, *supra*; Baring v. Corrie, 2 Barn. & Ald. 137, 143, 148, 2 Eng. Ruling Cas. 391, 394, 397-98.

[23] See City of Little Rock v. Barton, 33 Ark. 436, 445, 446, 447; City of Portland v. O'Neill, 1 Oreg. 218, 219; Braun v. City of Chicago, 110 Ill. 186, 194-95 (1884).

[24] See this idea variously expressed in Vinton v. Baldwin, 88 Ind. 104, 106, 45 Am. Rep. 447, 448; Fowler v. Hollins, L. R. 7 Q. B. 616, per Brett, J., dissenting, at p. 623, 3 Moak's Eng. Rep. 232, 238; Saladin v. Mitchell, 45 Ill. 79, per Breese, C. J., at p. 83; Higgins v. Moore, 34 N. Y. 417, per Wright, J., at p. 424.

[25] See Saladin v. Mitchell, 45 Ill. 79, 83.

[26] Compare especially, however, Vinton v. Baldwin, 88 Ind. 104, 105, 106, 45 Am. Rep. 447, 448, 449; Haas v. Ruston, Ind. App. (1895) 42 N. E. Rep. 298, 302, 42 Cent. L. J. 109.

case,[27] that a broker "usually deals with the contracting parties, and not with the things which may be the subject of the contract." The substitution of "transacting" and "transaction" for "contracting" and "contract" would, of course, make this statement more comprehensively accurate.

Need of Establishing Existence of a Broker's Functions.—Before one person can claim to have acted as broker for another, it is necessary to establish a contract of employment, so as to show the existence of the relation of principal and agent. Such a state of affairs, if denied, must be affirmatively established, though it may be made out by implication from facts and circumstances; and obviously it is not enough to prove that a person claiming to have acted as broker had asked and obtained of the owner of property the selling or other price of such property.[28] But it is further necessary to establish functions distinct from those of an ordinary agent or employee, and characteristic of a broker; though when this is done, all controversy is ended.[29] It sometimes, however, becomes difficult to distinguish between a broker and a clerk. The essential difference is that the latter hires his services exclusively to one person, instead of acting as intermediary between other persons, and receives for such services a fixed stated salary, instead of a commission or other compensation in the way of brokerage.[30]

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[27] Haas v. Ruston, 42 N. E. Rep. 301, per Lotz, J.

[28] Castner v. Richardson, 18 Colo. 496, 497, 33 Pac. Rep. 163. As to admissibility of evidence to rebut a claim that parties were doing a general brokerage business, and were not furnishing money as principals, see Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 29, 20 Pac. Rep. 28, 34. As to a broker partly acting as principal in carrying stock on margin, see Kiff v. Stoddard, 63 Conn. 198, 220-22, 26 Atl. Rep. 874, 881, 21 Law Rep. Ann. 102, 113.

[29] See, for example, Harley v. City of Hot Springs (Ark.) (1889), 11 S. W. Rep. 694.

[30] Fete v. Lanaux, 45 La. Ann. 1343, 1346 (1893), 14 South. Rep. 241, 243. But a traveling salesman is not in a technical or popular sense, a broker or factor, merely because he is compensated for his services by commissions on the sales effected by him, so as to prevent his compensation from constituting wages or salary exempt from attachment. Hamberger v. Marcus, 157 Pa. St. 133, 139 (1893), 27 Atl. Rep. 681, 682, 33 Weekly Notes Cas. 201, 38 Cent. L. J. 238.

CONVEYANCE — EXPECTANT INTEREST—VALIDITY — ANCESTOR'S ASSENT.

HALE v. HOLLON.

Supreme Court of Texas, February 25, 1897.

1. A conveyance of an expectant interest in an estate may be valid in equity.

2. The ancestor's assent is not essential to the validity of his heir's conveyance of an expectant interest in his estate, particularly where he is *non compos mentis*.

DENMAN, J.: S. E. Hollon, who was all her life *non compos mentis*, died October 15, 1894, at the age of about 68 years, the owner of valuable real estate situated in McLennan and other counties in Texas, which she had inherited some years before, leaving as her heirs her brothers, D. P. Hollon and W. R. Hollon, and the children of a deceased sister; said D. P. Hollon having been her guardian for some years. Prior to the 25th day of June, 1894, various judgments were rendered against D. P. Hollon, and on that date he executed to his brother, W. R. Hollon, a conveyance of his "entire interest in the estate of S. E. Hollon, of whatsoever kind and nature she is now in possession of, or may hereafter become possessed of," which conveyance contained a general warranty of title, and was duly filed for record in McLennan county on the day of its execution. A few days after the death of S. E. Hollon, executions, issued upon said judgments, were levied upon an undivided one-third interest in the lands owned by S. E. Hollon at the date of her death as the property of D. P. Hollon, and at the sales under said executions the same was purchased by plaintiff in error, V. W. Hale. On the 10th day of January, 1895, said Hale brought this suit against D. P. and W. R. Hollon, and, in addition to the facts above stated, alleged that said transfer from D. P. to W. R. Hollon was executed for the purpose of hindering, delaying, and defrauding the creditors of D. P. Hollon, who was then insolvent, and for the purpose of defrauding the said S. E. Hollon, the same being made without her knowledge or consent,—all of which was well known to W. R. Hollon; wherefore he prayed for a cancellation of said instrument as being a cloud upon his title acquired as purchaser at the execution sales aforesaid. W. R. and D. P. Hollon answered by general denial, and W. R. Hollon answered specially, denying all knowledge of insolvency of D. P. Hollon, or of any fraud or intent to hinder or delay creditors in the execution of said instrument; alleging that he purchased the interest of D. P. Hollon in the estate of their sister, S. E. Hollon, in good faith, paying value therefor; and prayed for a cancellation of plaintiff's deeds as a cloud upon his title thereto. On trial before the court without a jury, judgment was rendered that plaintiff take nothing by his suit, and that the deeds from the sheriff to plaintiff be canceled as a cloud upon the title of defendant W. R. Hollon. The trial judge filed no conclusions of fact or law. The court of civil

appeals, in affirming the judgment, upon conflicting testimony, find as a fact "that the transfer (from D. P. to W. R. Hollon, above mentioned) was not made with intent to defraud creditors of D. P. Hollon."

It is assigned as error here that the court of civil appeals erred in holding that D. P. Hollon could, as against his judgment creditors, make a valid conveyance of a naked expectancy without the knowledge or consent of S. E. Hollon. The first question involved in the assignment is, could D. P. Hollon contract with reference to the mere expectancy of inheritance from his sister in such way that by virtue of such contract any property he might inherit from her would pass to W. R. Hollon? Whatever may be the rule at law, it is well settled, as stated in Spence's Equity Jurisdiction (volume 2, p. 865), that "a naked possibility or expectancy of an heir to his ancestor's estate, or even of the anticipated rights of a person as next of kin, may be the subject of contract in equity, which will be equivalent to an assignment of the property if and when it shall fall into possession." Nimmo v. Davis, 7 Tex. 26; Richardson v. Washington, 88 Tex. 339, 31 S. W. Rep. 614; Tailby v. Official Receiver, 13 App. Cas. 523; Matsin v. Marlow, 65 N. C. 695; Jenkins v. Stetson, 9 Allen, 128; *In re* Fritz's Estate, 160 Pa. St. 156, 28 Atl. Rep. 642.

The second question involved in the assignment is: Conceding that D. P. Hollon could bind himself by such a conveyance, was same binding upon his judgment creditors? If it be admitted that creditors, in the absence of contract, have any legal or equitable right to look to such expectancies for satisfaction of their claims, and therefore have the right to insist that the debtor do not dispose of same with intent to defraud them,—upon which question we do not deem it necessary to express an opinion,—still the court of civil appeals, in support of the judgment of the trial court, having found as a fact that the conveyance was not made with intent to defraud creditors, such finding is conclusive upon us, and we must therefore hold, as a matter of law, that the conveyance is as binding upon such creditors as upon the debtor, D. P. Hollon. *In re* Fritz's Estate, 160 Pa. St. 156, 28 Atl. Rep. 642; Fitzgerald v. Vestal, 4 Sneed, 258; Read v. Mosby, 87 Tenn. 759, 11 S. W. Rep. 940; Stover v. Eycleshimer, *42 N. Y. 620.

The third question involved in the assignment is: Conceding that such an expectancy is a subject-matter of contract in equity, and that there was no actual fraud in the execution of the instrument from D. P. to W. R. Hollon as above indicated, does the mere fact that S. E. Hollon did not assent thereto, she being without capacity to assent, prevent its having any binding force or efficacy? The doctrine of McClure v. Raben, 133 Ind. 507, 33 N. E. Rep. 275, answers this question in the affirmative, and that of Mastin v. Marlow, 65 N. C. 695, in the negative. We have been able to find no other direct authority. Doubt as to how this question should be answered was the ground upon which we granted the application for writ of error. The rules permitting and regulating dealings by expectants with reference to such expectancies, being of common law origin, were adopted by us along with the body of that law by act of congress of the republic of Texas approved January 20, 1840, which provided "that the common law of England (so far as it is not inconsistent with the constitution or the acts of congress now in force) shall, together with such acts be the rule of decision in this republic, and shall continue in full force until altered or repealed by congress." The inquiry then naturally presents itself, what was the common-law rule as recognized in the courts of England at that time upon the question under consideration? For since there has been no statute or direct decision in this State in reference thereto it would seem that such rule should be entitled to much respect at this late day, as being the probable basis of many titles to land. While the courts of equity in England have long recognized and enforced contracts by expectants in reference to such expectancies, they have from the earliest period viewed them with great suspicion. This arose first from the fact that such expectants, being often young, inexperienced, hard pressed, or of extravagant habits, are inclined to sacrifice their future interests to meet their present real or imaginary wants, thus rendering them easy victims of the schemes of that cunning and pernicious element who too often mark them as their prey; and, second, from the fact that such transactions are looked upon as a species of fraud upon the ancestor or person from whom the expectancy is to be received, in that they, being usually of a secret nature, tend to destroy or lessen his influence and control over the expectant by giving him independent means of gratifying his desires, and in that the ancestor would often be thereby deluded into virtually leaving his property not to the persons intended, but to the stranger who had so insidiously undermined his domestic authority, and encompassed the ruin of the intended beneficiary of his fortune. Therefore, as early as the leading case of Earl of Chesterfield v. Janssen, 2 Ves. Sr. 158, 1 Atk. 339, decided in 1750, we find the doctrine firmly established in said courts that, whether the suit be by the holder of the contract to enforce specific performance, or by the expectant to be relieved from the terms thereof, the *prima facie* presumption was that the same was a fraud both upon the expectant and the ancestor or party from whom the expectancy was to be derived, and therefore the burden was imposed upon the holder to rebut such presumption, in order, in one case, to obtain the relief prayed for by him, or, in the other, to defeat that sought by the expectant. We are not called upon in this case to determine the character of proof the holder was required to produce in order to rebut such presumption, except as to whether it was necessary to show the

consent of the ancestor or person from whom the expectancy was to be derived. Doubtless, the absence of such assent, where the whole evidence did not clearly show a fair and just transaction, was considered by the courts as most cogent evidence of fraud entitling the expectant to relief, but we have been able to find no English case where its mere absence has been held to authorize such relief if the proof offered showed a transaction otherwise free from fraud, unfairness, and inadequacy of consideration. Indeed, most of the cases seem to proceed upon the assumption that there was no such assent; [so much so that Lord Brougham erroneously considered that no relief could be granted against the contract if it were present. Earl of Aylesford v. Morris, 8 Ch. App. 491. In Beckley v. Newland, 2 P. Wms. 182, decided in 1723, Beckley and Newland, having married sisters, who were cousins and presumptive heirs of Mr. Sturgis, a very wealthy man, who had made and revoked several wills, entered into an agreement whereby they agreed to divide equally all property which Mr. Sturgis might give to either of them by last will. Subsequently Mr. Sturgis made a will, leaving to Newland the greater portion of his property; and, after the death of Mr. Sturgis, Beckley filed his bill to enforce the specific performance of the agreement for an equal division. It was objected by Newland that the agreement ought not to be enforced, because it tended to defeat the purpose of the testator, who, in all probability, would have given nothing to either of the parties to the agreement in case he could have foreseen that his disposition was to be thus frustrated. Lord Chancellor Macclesfield, however, enforced the agreement, holding that it could not be unreasonable to agree to divide the property according to what would have been the course of descent in case Mr. Sturgis had died intestate. In this case there was clearly a concealment of the agreement from Mr. Sturgis, and its purpose and effect were to encompass the defeat of his will, and pass the property in a different way from that intended by him, and to render the contracting parties more independent of his wishes than they otherwise would have been; yet the learned chancellor, considering upon the whole case that the agreement was not inequitable, enforced its performance, notwithstanding the concealment from want of assent of Mr. Sturgis. In Earl of Chesterfield v. Janssen, *supra*, though the agreement contemplated that the transaction should be kept secret from the Duchess of Marlborough, Justice Burnett, though declining to decide whether, under all the circumstances, the agreement should have been relieved against if it had not been subsequently confirmed by the expectant, said: "It may be thought too rigid to say that an heir shall not borrow upon an expectancy; as some persons are so niggardly and sparing to their children that a poor heir may starve in the desert, with the land of Canaan in his view, he could not relieve himself this way," and Lord Hardwicke, after delivering a *dictum*, which has ever since been referred to as the most lucid exposition of the law relating to such contracts to be found in the books, proceeded to dispose of the case by holding that the bond was not void at law, but at most merely voidable in equity; and therefore, since the expectant had ratified it after the death of the duchess, no relief could be had. In Earl of Aylesford v. Morris, 8 Ch. App. 484, decided in 1871, the expectant applied for relief from a most unconscionable bargain, which had been carefully concealed from his father. Lord Chancellor Selborne, in passing upon the case, said: "In the cases of catching bargains of the expectant heirs, one peculiar feature has been almost universally present; * * * the victim comes to the snare * * * excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud, the fortunes of families, is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants. Whatever there may be in any such collateral considerations, they could hardly prevail if they did not connect themselves with an equity more strictly and directly personal to the plaintiff in each particular case." After thus disposing of the fact of non-assent of the ancestor as being insufficient of itself to authorize relief, he proceeded to show that the circumstances attending the transaction, including the concealment from the father and the unconscionableness of the bargain, were such as to bring the case within the rule, and thereupon entered a decree in the usual form in such cases, granting relief against the terms of the contract if the expectant within a given time should repay defendant the money advanced with lawful interest, in default of which his bill should be dismissed. Thus it seems clear that, while courts of equity in England have always considered concealment from or non-assent of [the ancestor as cogent evidence of fraud, when connected "with an equity more strictly and directly personal to the plaintiff in each particular case," they have never deemed it sufficient of itself to authorize relief against the contract where the person dealing with the expectant has shown in rebuttal of the presumption above discussed that the transaction was otherwise free from fraud, unfairness, and inadequacy

of consideration; and it is important to note, as said by Lord Selborne in the opinion above cited, "fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions." They appear to have proceeded upon the logical idea that, having recognized the right of an expectant to contract with reference to such expectancies, such contract, when shown under the strict scrutiny of a court of equity to be otherwise unobjectionable, cannot be set aside for mere want of the assent of one not a party thereto.

Having ascertained, as best we could, the rule recognized in England at and since the enactment of our statute adopting the common law, we will examine the cases asserting a contrary doctrine in this country. In Boynton v. Hubbard, 7 Mass. 111, decided in 1810, it was held, as we understand the opinion by Parsons, C. J., that a contract by an expectant to convey a portion of his expectancy, though free from fraud as between the contracting parties, is void when made without the assent of the ancestor, on the sole ground that it is a fraud upon such ancestor productive of public mischief, and against sound public policy. The opinion seems to confuse the powers and jurisdictions of courts of law and equity, and is difficult to understand. It is severely criticised by the editor in his notes to said report, wherein he maintains that, the proceeding being one at law, the contract was erroneously held void, as it "was undoubtedly good at the common law, and voidable only in a court of equity." The opinion is not sustained by the cases cited therein. Though the learned chief justice said in the course of the opinion that the fairness of the transaction had been settled by the verdict, the reported facts show that the bargain was a most unconscionable one, and it may be that opinion was influenced more by that fact than the report of the case would indicate. We do not find any case in that State where the precise question whether a contract otherwise fair and equitable as between the parties was held void merely for want of the assent of the ancestor. This case is dissented from in an opinion rendered by the Supreme Court of North Carolina in 1859, wherein such a contract was upheld, the court, through Battle, J., saying: "It is true that the policy of giving effect to contracts of this kind against expectant heirs has been doubted by very eminent judges; and Chief Justice Parsons, in Boynton v. Hubbard, 7 Mass. 112, refused to sanction an assignment, made by a nephew in the life-time of his uncle, of his expectant interest in that uncle's estate. But the doctrine is now too well established to be disregarded, and the authorities to which they refer fully sustain White & Tudor in saying that a mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may become entitled under an appointment, or in personal estate as presumptive next of kin of a person then living, is assignable in equity for a valuable consideration; and, where the expectancy has fallen into possession, the assignment will be enforced." McDonald v. McDonald, 5 Jones, Eq. 211. In Alves v. Schlesinger, 81 Ky. 290, which was a suit in equity, decided in 1883, in a very brief opinion, without discussion or citation of authorities, the doctrine is announced for the the first time, as far as we have been able to discover from the reported cases, that an agreement entered into by a brother, for a valuable consideration, to convey to his sister all the right, title, and interest that he then had or might thereafter acquire by gift, devise, or descent from his mother in certain lands, and whereby he agreed to execute and deliver to his sister all necessary and proper deeds to perfect the title when it could be done, or his interest in the property might be determined, the agreement being made at the instance of the mother, and without any fraud or unfairness as between the brother and sister, conferred no right whatever upon the sister, and could not be enforced, for the reasons (1) that the mother's assent was merely verbal, and she did not thereby deprive herself of any interest in the property in favor of the daughter; and (2) that the son, during the life-time of the mother, "had no right or interest therein, legal or equitable, vested or contingent. In fact, what he sold and undertook or agreed to convey had neither actual nor potential existence." This being a proceeding in equity, it is difficult to understand by what process of reasoning the learned judge who delivered the opinion reached the conclusion under the authorities that the son could not, in equity, bind himself by contract to convey his expectancy to the sister, or that any more than a verbal assent from the mother could be necessary in any event. We have been able to find no decided case which supports this decision, and, as we have seen above, the settled law elsewhere is to the contrary. Even Boynton v. Hubbard clearly would have been decided differently if the verbal assent of the uncle had been given. The effect of the decision was to ignore the son as a contracting party, and render it necessary for the mother, who was not a party to the contract, to have made such an agreement as would have bound her to carry out the contract between the son and daughter. In McClure v. Raben, 125 Ind. 139, 25 N. E. Rep. 179; *Id.*, 133 Ind. 507, 33 N. E. Rep. 275, cited above, the court, relying for authority upon Boynton v. Hubbard and Alves v. Schlesinger, *supra*, and Hart v. Gregg, 32 Ohio St. 512, held, as above indicated in the beginning of the discussion of this question, that the assent of the ancestor was absolutely essential to the validity of the contract, and that the fact that she was *non compos mentis*, and therefore unable to assent, did not change the rule, and therefore held the deed made by the expectant void for want of such assent. The court say that the Ohio case is di-

rectly in point. We have examined that case, and are of opinion that it has no bearing whatever upon the question. There plaintiff, holding an ordinary deed, without warranty, from one Gordon to a tract of land, brought suit to recover the same against the party in possession, and it was shown on the trial that at the date of the deed the title was in the father of Gordon, and not in him, but that the father had died before the institution of the suit, leaving said grantor, Gordon, as his only heir; and the court held that the title inherited by the son from the father after the execution of the deed did not pass by estoppel to the plaintiff, for the reason that there was no warranty, nor was there any recital of any fact in the instrument which would estop the grantor from asserting an after-acquired title. It was not a case where the son had attempted to convey an interest which he might thereafter derive from his father by inheritance or otherwise. The above are all the authorities we have been able to find holding that the assent of the ancestor is necessary to the validity of a contract otherwise unobjectionable.

On the other hand, following the principles laid down in the English cases above discussed, such contracts have been upheld when shown to be fair and equitable, though the assent of the ancestors did not appear, but, on the contrary, the inference from the circumstances stated is that the transaction were without their knowledge, in the following cases: *In re* Fritz's Estate, 160 Pa. St. 156, 28 Atl. Rep. 642; Stover v. Eyeleshimer, *42 N. Y. 620; Steele v. Frierson, 85 Tenn. 430, 3 S. W. Rep. 649; McDonald v. McDonald, 5 Jones, Eq. 211. It is true that in none of these cases does it appear that any contention was made that the absence of the assent of the ancestor invalidated the contract, but in the last case cited from North Carolina it is clear that the question was squarely before the court from the fact that, as above indicated, the opinion of Chief Justice Parsons in Boynton v. Hubbard, where that was the sole question, was disapproved. In Mastin v. Marlow, 65 N. C. 695, referred to in the beginning of this discussion, the facts of the case appear to be of the same character as those in McClure v. Raben, *supra*. The bill for specific performance alleged that the ancestor was *non compos mentis* at the time two of his children executed the instrument sought to be enforced, so that it is clear that the court had before it the fact that there was no assent on the part of the ancestor, but still it was held, referring to McDonald v. McDonald, *supra*, that the suit was improperly dismissed for want of equity in the bill, the court saying: "The power of an heir expectant to bind himself by contract, in regard to what may descend to him by the death of the ancestor, is taken to be settled. In some cases, when the consideration is fair and adequate, and no undue advantage has been taken, the decree is for specific performance. In other cases, when advantage has been taken of the necessity of the party, the contract is held as a security for the return of the money actually advanced, together with interest, while in other cases all relief is refused, because of fraud and imposition. Under which of these three classes the case in hand will fall it is not for us now to say, as the plaintiffs will no doubt ask the privilege of amending the bill, so as to make the allegation in respect to the price paid, and the fairness of the transaction, more distinct and direct."

While, as before stated, there has been no direct decision in this State upon the question, we do not feel at liberty to leave unnoticed the remark of Justice Wheeler in Nimmo v. Davis, 7 Tex. 26, which was a case upholding a voluntary partition of property made by the life tenant and remainder-man during the life of the former. In course of the opinion rendered in 1851, that learned jurist, after referring to the right to contract with reference to expectant or future interests as settled law, said: "There is, however, this restriction upon the dispositions of heirs dealing with their expectancies, and reversioners and remainder-men dealing with property already vested in them, that it is incumbent on the party dealing with them 'to make good the bargain,'—that is, to show that the dealing is fair, and for an adequate consideration." When analyzed, this will be found to be probably the clearest, most concise, and at the same time the most comprehensive statement of the rule as applied in the courts of equity in England, to be found in the books; but it does not agree in all respects with some of the decisions in this country. It places "heirs dealing with their expectancies" upon the same footing with "reversioners and remainder-men dealing with property already vested in them," as has always been the case in England (Earl of Aylesford v. Morris, 8 Ch. App. 497), but not in some of the courts of this country. It imposes the burden of proof on the holder of the contract "to make good the bargain," quoting the favorite expression of the English judges. It interprets the quotation to mean just what has always been its construction in England,—that is, that the purchaser must show not only that the "dealing is fair," but also that he paid an "adequate consideration,"—the rule being well settled in England that the purchaser, in order "to make good the bargain," must not only show that he perpetrated no actual fraud, but that he did not make an inequitable deal, the courts being so strict on this question as to adequacy of consideration that an act of parliament was finally passed to relieve against its supposed harshness in certain cases. Earl of Aylesford v. Morris, *supra*. It does not, in mentioning the restrictions thrown around such transactions by law, follow Chief Justice Parker, with whose opinion in so noted a case, rendered 40 years before, we must assume the court was familiar, in going beyond the rule as then long well established in England, by requiring, in addition, the assent of the ancestor. In view of the long-established rule in

England at the date of our statute adopting the common law, holding such transactions valid in the absence of the assent of the ancestor when shown to be otherwise unobjectionable under the strict scrutiny of a court of equity, notwithstanding the presumption of fraud, indulged against them, and merely voidable when not so shown, taken in connection with the early and to this date unchallenged remarks of Justice Wheeler, above quoted, a court should long hesitate now before adopting the rule laid down by Chief Justice Parson in Boynton v. Hubbard, holding absolutely void as contrary to public policy, solely on account of the non-assent of the ancestor, every such transaction had in this State since 1840, no matter how just and fair in other respects. Though we do not feel called upon by the facts of the case before us to determine whether the transfer in this case would have been valid had S. E. Hollon been sane, we have deemed it necessary to say this much in order to prevent our disposition of this case, upon what might otherwise be considered an exception to the rule laid down in Boynton v. Hubbard, from being taken as an approval of such rule.

The transaction between D. P. and W. R. Hollon having been found by the court of civil appeals, in face of the presumption of fraud indulged in such cases, to have been free from same, it could not even have been held voidable as a matter of law under the English rule merely for want of the assent of S. E. Hollon; and we are of the opinion that even under the rule of Boynton v. Hubbard the want of her assent, she being *non compos mentis*, would not render it void. In such a case the reason of the rule fails; for, she having no capacity to exercise any influence or control over the expectant or to change by will or otherwise the course of descent of her property, no moral or legal right of hers was invaded by the transaction between her brothers, and hence it could be no fraud upon her. Such a case, in our opinion, should be held an exception to, or rather not to be within the rule of, Boynton v. Hubbard. We must therefore overrule the assignment of error above stated, and, being of opinion that the court of civil appeals correctly disposed of the various other assignments, we deem it unnecessary to discuss them again here. The judgment will therefore be affirmed.

NOTE.—The American cases as a rule uphold the doctrine that a grant by an heir apparent of his interest in his ancestor's estate executed while the ancestor is living is generally regarded as inoperative as a present conveyance. Stoves v. Encleshimer, 46 Barb. 84; Davis v. Hayden, 9 Mass. 519; Dart v. Dart, 7 Conn. 256; Bayles v. Commonwealth, 40 Pa. St. 37; Jackson v. Wright, 14 Johns. 193; Jackson v. Waldron, 13 Wend. 178. But although a conveyance of an expectancy, as such, cannot be made at law, such a conveyance may be enforced in equity as an executory agreement to convey provided it be entirely fair and sustained by an adequate consideration. Bayles v. Commonwealth, 40 Pa. St. 43; Parsons v. Ely, 45 Ill. 232; Jenkins v. Stetson, 9 Allen, 128; McLure v. Roben, 25 Ind. 139; Lewis v. Madison, 1 Munf. (Va.) 303; People v. Dannat, 77 N. Y. 45; Bacon v. Bonham, 33 N. J. Eq. 313. Judge Story says on this subject, "so even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement, and in such case if made *bona fide*, for a valuable consideration, it will be enforced in equity after the death of the ancestor, not indeed as a trust attaching to the estate, but as a right of contract." 2 Story Eq. Jur. § 1040. There are cases however holding that even in equity a conveyance of an expectancy cannot be enforced. See McCall's Admr. v. Hampton (Ky.), 41 Cent. L. J. 432, and note; Read v. Mosby (Tenn.), 29 Cent. L. J. 190, and note.

But even at law the grantee of one who has at the time of the conveyance no title, may, if the deed be with warranty acquire the estate which his grantor subsequently obtains in the land—this upon the doctrine of estoppel. Cole v. Raymond, 9 Gray, 218; Knight v. Thayer, 125 Mass. 25; Irvine v. Irvine, 9 Wall. 625; O'Bannon v. Paremore, 24 Ga. 493; Jarvis v. Aikens, 25 Vt. 635; Gochenour v. Mowry, 33 Ill. 331; Reese v. Smith, 12 Mo. 344; Broadwell v. Phillips, 30 Ohio St. 255; Wiesner v. Zaun, 39 Wis. 188; Comstock v. Smith, 23 Amer. Dec. 670, and note; Trull v. Eastman, 3 Metcalf, 126; Hale v. Hallon (Tex.), 35 S. W. Rep. 843. Releases of an heir's expectancy have also been upheld as valid. Bishop v. Davenport, 58 Ill. 110; Quarles v. Quarles, 4 Mass. 680; Fitch v. Fitch, 8 Pick. 480; Neswith v. Dinsmore, 17 N. H. 575; Parsons v. Ely, 45 Ill. 232. See article on this subject in 17 Cent. L. J. 67.

BOOK REVIEWS.

UNDERHILL ON TRUSTS AND TRUSTEES.

The original work of Mr. Underhill of which this is the first American edition, has for some time been a leading text book in England. Its value to the profession of that country is evidenced by the fact that it has there reached its fourth edition. Its merit consists largely in the concise and clear manner in which the elementary doctrines pertaining to trusts, are laid down. It differs from the ordinary text work in this: that it consists of statements of general propositions followed by illustrations and citations of cases. This manner of treatment renders it especially valuable to the student, while in no measure detracting from its usefulness to the practitioner. The subject of trusts and trustees, their powers, duties, rights and responsibilities is thoroughly and carefully presented. The American editors are Messrs. F. H. and Adolph Wislizenus, members of the St. Louis bar, whose scholarly attainments are well known. Though the book has but five hundred pages, so large a part of it, especially that devoted to illustrative cases, is in small type, that the number of pages is hardly a fair measure to the bulk of matter within. It has a good index and is published by the F. H. Thomas Law Book Co., St. Louis.

OSTRANDER ON FIRE INSURANCE.

The republication of this treatise in the shape of a second edition within the comparatively short time since its first appearance attests most forcibly its merit and value to the profession. Much has been added to the original text and a large number of new cases are discussed and cited. The author of this work has evidently given the important subject of which it treats, the most careful study and exhaustive research. Unlike many text books of the present day, it is not a

mere digest, but partakes more of the character of a philosophical treatise. Throughout the work will be found valuable discussions of controverted questions of law with which the subject of fire insurance abounds. It is comprehensive and so far as we have been able to discover by a careful examination seems to embrace every point liable to arise in contested insurance cases. It is a neat volume of six hundred pages. Published by West Publishing Co., St. Paul.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION ON SEPARATE CONTRACTS — Parties.—Two attorneys, not partners, employed by the same client under separate contracts, cannot jointly sue for their services.—STARRETT v. GAULT, Ill., 46 N. E. Rep. 220.

2. ADMINISTRATION — Allowance of Claims.—Under Rev. St. ch. 3, § 70, providing for allowance of claims against estates presented within two years after administration, the claim is not barred if not presented, but simply the right to participate in the property inventoried.—WAUGHOP v. BARTLETT, Ill., 46 N. E. Rep. 197.

3. ADMINISTRATION — Rights of Legatees.—In a suit by residuary legatees against the executors of testator's executor, who had never made a final account or settlement, to establish a claim against the latter's estate for sums due under the will, complainants may contradict or surcharge partial annual settlements made by the deceased executor and confirmed by the probate court.—BLISS v. SEAMAN, Ill., 46 N. E. Rep. 279.

4. ADMINISTRATION — Executor — Power to Bind Estate by Contract.—A contract made by an offer to an executor, and an acceptance of the same by him in his own name, for the erection of a monument for the estate of which he is executor, does not create a liability which can be enforced against the estate.—DURKIN v. LANGLEY, Mass., 46 N. E. Rep. 219.

5. APPEAL—Supreme Court — Power to Order Cases Transferred.—Const. Amend. 1890, §§ 1-4, divide the supreme court into two divisions of concurrent jurisdiction in civil cases; give division 2 exclusive cognizance of criminal cases; and provides that all laws relating to practice in, as well as the rules of, the supreme court shall apply to each division when applicable, and that where the judges of a division are equally divided, or one of them dissents, "or where a federal question is involved," the case, "on the application of the losing party," shall be transferred to the court for its decision: Held, that the court *in banc* cannot, on application to it by the losing party, review the decision of a division that no federal question is involved in the case, and refusing to transfer it to the court.—STATE v. DUESTROW, Mo., 39 S. W. Rep. 266.

6. APPLICATION OF PAYMENT—Proceeds of Collateral.—Where the parties have made no application of the proceeds of collateral security pledged for the indebtedness of the pledgor generally, and the oldest debt is also one on which there is a surety, the courts will make the application to such debt in relief of the surety.—BLACKMORE v. GRANBERRY, Tenn., 39 S. W. Rep. 229.

7. ASSIGNMENT — Claim of Damages for Fraud.—A claim for damages alleged to have been sustained by reason of a conspiracy to defraud is not assignable as a claim for injury to personal property.—JOHN V. FARWELL CO. v. WOLF, Wis., 70 N. W. Rep. 289.

8. ATTACHMENT—Fraud.—In the absence of fraud on the part of a vendee in obtaining goods, the vendor who has taken the notes of the vendee cannot maintain attachment against the vendee after the notes have been assigned to and while they remain with another, even if the assignee, in purchasing the notes, relied upon the vendor's indorsement.—LANDAUER v. ESPENHAIN, Wis., 70 N. W. Rep. 287.

9. ATTACHMENT — Garnishment.—A debt due by a resident of Vermont, which is represented by a note payable to a resident of New York, who has it in possession, cannot be attached in Vermont on trustee process, so as to preclude a subsequent recovery on it by the payee in New York.—WARD v. BOYCE, N. Y., 46 N. E. Rep. 180.

10. ATTORNEY AND CLIENT — Value of Services—Hypothetical Question.—While the result of a litigation is a proper element for consideration in determining the value of an attorney's service therein, its omission from a hypothetical question to an expert does not render the question objectionable, as such element may be included in cross-examination.—MORRILL v. HERSHFIELD, Mont., 47 Pac. Rep. 997.

11. BANKS—Deposit for Special Purpose.—A bank receiving a deposit with instructions to credit it to the account of another bank for the use of a person specified holds it in trust for that purpose, and cannot, by crediting it generally to the bank named, which is its debtor, vest the title to the fund in itself; and where the bank for which the deposit is made fails without having received the deposit, or made advances on account of it, the purpose for which it was made having failed, the bank holding it is liable to the depositor for its return.—AMERICAN EXCH. NAT. BANK v. LORETTA GOLD & SILVER MIN. CO., Ill., 46 N. E. Rep. 202.

12. BANKS—Receiving Deposits when Insolvent.—To receive money, giving a certificate of deposit therefor payable at a certain time, with interest, is receiving it "on deposit," within Rev. St. § 4541, declaring it an offense for an officer of a bank, when knowing it is insolvent, to receive money "on deposit" or "for safekeeping" or "to loan" or "for collection."—STATE v. SHOVE, Wis., 70 N. W. Rep. 312.

13. BILLS AND NOTES — Collateral Attack.—Where a note is transferred to a trust company as collateral security for certain interest payments which the owner of the note has guarantied, the owner cannot, without the consent of the trust company, sue on the note in his own name, since he is not the party really inter-

ested, within Code, § 2594.—ALABAMA TERMINAL & IMPROVEMENT CO. v. KNOX, Ala., 21 South. Rep. 495.

14. BILLS AND NOTES—Indorsement.—In a suit on an indorser's contract to pay 2 per cent. per month on the amount of the note "so long as said note, or any part thereof, shall remain unpaid," plaintiff may recover such interest to the time of trial.—GLIDDEN v. CHAMBERLIN, Mass., 46 N. E. Rep. 103.

15. CARRIERS — Passenger — Joint Tort-feasors.—Where a passenger, without fault on his part, is injured by the negligence of the carrier, on whose train he is rightfully traveling, and of another company with whom he has no contract, he may sue either company for the injury.—WEST CHICAGO ST. R. CO. v. PIPER, Ill., 46 N. E. Rep. 186.

16. CARRIERS — Measure of Damages.—The measure of damages for injuries to stock in shipment is the depreciation of its value in the market at the point of destination, though beyond the line of the carrier causing them.—ST. LOUIS, ETC. RY. CO. v. DE SHONG, Ark., 39 S. W. Rep. 260.

17. CHATTEL MORTGAGES — Breach of Condition.—After breach of the conditions of a chattel mortgage, the mortgagee becomes the legal owner of the property, entitling him to maintain an action for injuries thereto, though he has not yet taken possession.—WYLIE v. OHIO RIVER CO. OF SOUTH CAROLINA, S. Car., 26 S. E. Rep. 676.

18. CHATTEL MORTGAGE — Satisfaction.—Where a chattel mortgagor performs labor for the mortgagee sufficient in value to pay the mortgage debt, under an agreement that it shall be so applied, the law will make the application as the labor is performed, and the mortgage will be discharged, and the title to the property revested in the mortgagor, whether the application is in fact made by the holder or not.—MCCULLARS v. HARKNESS, Ala., 21 South. Rep. 473.

19. CLERKS OF COURT—Duties and Liabilities.—Money received by a clerk of court under a decree providing for its payment into court, but not designating the clerk as depositary, is under the control of the court, which accordingly has jurisdiction of a motion to compel the clerk and his successor, or either of them, to account for the fund.—BALTIMORE & O. R. CO. v. GAULTER, Ill., 46 N. E. Rep. 256.

20. CONSTITUTIONAL LAW—Reviewing His Own Decisions.—Const. 1889, art. 6, § 8 (Const. 1895, art. 6, § 3), providing that "no judge shall sit in review of a decision made by him," requires the reversal of a judgment of the general term affirming an order of the special term made by one of the judges who sat in the general term, though he had forgotten his former connection with the case.—VAN ARSDALE v. KING, N. Y., 46 N. E. Rep. 179.

21. CONSTITUTIONAL LAW — Officers of the Commonwealth.—County commissioners are not "officers of the commonwealth," within the meaning of Const. pt. 2, ch. 1, § 2, art. 8, providing for the impeachment of such officers before the senate.—IN RE OPINION OF THE JUSTICES, Mass., 46 N. E. Rep. 118.

22. CONSTITUTIONAL LAW—Oleomargarine Act.—The provisions in the act of congress of August 2, 1886, defining butter, and imposing a tax upon the manufacture, etc., of oleomargarine (24 Stat. 209, ch. 840), that the marks, brands, and stamps required by the act to be placed on packages of oleomargarine, and the omission of which is made by the act a criminal offense, shall be designated by the commissioner of internal revenue, involve no unconstitutional delegation of power to determine what acts shall be criminal, since the criminal offense is fully and completely defined by the act, and the designation of the marks, brands, and stamps is merely the discharge of an administrative function, needful to the operation of the machinery of the law.—IN RE KOLLOCK, U. S. S. C., 17 S. C. Rep. 444.

23. CONSTITUTIONAL LAW—Tenure of Office—Police Justices.—Const. art. 6, § 22, providing that justices of the peace and other local judicial officers in office when the article takes effect shall hold their offices until the expiration of their respective terms, is a saving clause merely, and does not forbid the legislature to abolish such inferior courts and judicial offices as are not expressly continued by the constitution.—KOCH v. MAYOR, ETC., OF CITY OF NEW YORK, N. Y., 46 N. E. Rep. 170.

24. CONTRACT—Construction.—The construction of a written contract is for the court, and not for the jury.—GRAHAM v. SADLIER, Ill., 46 N. E. Rep. 221.

25. CONTRACT—Construction.—Where no time of performance is fixed in a contract, a reasonable time will be presumed to have been intended, to be determined by the nature of the contract.—GRIFFIN v. OGLETREE, Ala., 21 South. Rep. 488.

26. CONTRACT — Construction — Payment in Installments.—A contract for grading which provides for a payment of an installment on the price as each successive one-fourth of the work was finished is severable, so that the contractor for default in payment of one installment may, without finishing the work, sue for the contract price of the part finished, though he was not actually prevented by the other party from completing the work.—KEELER v. CLIFFORD, Ill., 46 N. E. Rep. 248.

27. CONTRACT—Joint Contract—Parties.—It appearing by plaintiff's pleadings in an action on contract that one not a party was a joint contractor with defendant, and there being a presumption that he is alive (seven years from date of contract not having elapsed), plea in abatement is not necessary, but nonjoinder may be availed of on error.—SINSHEIMER v. WILLIAM SKINNER MANUFG. CO., Ill., 46 N. E. Rep. 262.

28. CONTRACT — Lotteries—Gambling—Lex Loci.—An agreement to share in the proceeds of a lottery ticket is not valid because the lottery was legal in the State where the tickets were issued and the drawing took place.—ROSELLE v. MCAULIFFE, Mo., 39 S. W. Rep. 274.

29. CONTRACT—Parol Evidence.—In an action on a written contract, whereby defendants agreed to deliver cattle of a good average of a certain county, in the absence of fraud or mistake, parol evidence is not admissible that at the time the contract was made plaintiffs agreed not to employ others to procure cattle for them in the south half of said county, in which territory defendants expected to buy their cattle, and that plaintiffs had violated their agreement.—FOOTE v. FROST, Tex., 39 S. W. Rep. 328.

30. CONTRACT—Work and Labor.—In an action for work and materials, an instruction that if the work was done under a special contract, as alleged, though not as skillfully as agreed, and defendant accepted the work, plaintiff was entitled to recover such sum as the work and materials were actually worth, was erroneous, in that it did not also charge that the amount recovered could not exceed the compensation fixed by the contract.—WALSH v. JENVEY, Md., 36 Atl. Rep. 817.

31. CORPORATIONS — Corporate Existence.—Rev. St. §§ 1772, 1773, provide that no corporation shall, until its articles of organization are duly recorded, have legal existence; that, until the directors are elected, the signers of the articles shall have direction of the corporation: Held, that a corporation becomes such when its articles are filed for record, and not when the subscribers subsequently meet to organize it.—BADGER PAPER CO. v. ROSE, Wis., 70 N. W. Rep. 802.

32. CORPORATIONS—Dissolution — Procedure.—A corporation organized for the exclusive pecuniary benefit of its members may be wound up by a majority of its members, in their discretion, whenever they deem this step to be in the interest of the whole association, provided this is done in good faith, and not for the purpose of speculation, and the intention of starting the company's business anew at a subsequent time.—PRINGLE ELTRINGHAM CONST. CO., La., 21 South. Rep. 515.

33. CORPORATIONS — Reduction of Capital Stock.—Where a corporation had been fully organized, with the exception of filing a certificate of organization as required by statute, before a proceeding for decreasing the capital stock was begun, and the certificate of completion of the organization was not filed until the day that the certificate of decrease was filed, and the proceedings to reduce the stock were completed two days later by the filing of the certificate, the corporation had such an existence as enabled the officers and stockholders to make the reduction.—GADE v. PERKINS, Ill., 46 N. E. Rep. 286.

34. CORPORATIONS—Right of Stockholders to Inspect Books.—Under Rev. St. ch. 32, § 13, providing that officers of corporations shall keep books of account, and that every stockholder shall have the right to examine the same, a stockholder and director is entitled to *mandamus* to command such an examination where the answer simply alleges that the petitioner has not been denied any information that could be derived from such examination, and impugns the object and purpose of the petition.—STONE v. KELLOGG, Ill., 46 N. E. Rep. 228.

35. CREDITORS' BILL—Exhaustion.—Where a creditor recovers judgment against a corporation, and has execution issued forthwith, and directs the sheriff to returnit "No property found, no part satisfied," forthwith, and the sheriff does so without any attempt to satisfy it, there is no such exhaustion of the creditor's legal remedy as will support a bill for the appointment of a receiver.—STIRLEN v. JEWETT, Ill., 46 N. E. Rep. 259.

36. CRIMINAL LAW — Arson.—While the burning of dwelling houses and the burning of barns are separate offenses under the statute, both are included in the crime of arson, as enlarged by statute (Shannon's Code, § 6529); and under an indictment containing two counts, one for burning a dwelling house and one for burning a barn, a verdict finding defendant "guilty of arson as charged" is applicable to both counts, and does not acquit on the charge of burning the barn.—STATE v. FRY, Tenn., 39 S. W. Rep. 231.

37. CRIMINAL LAW—Elections—Altering Returns.—In the absence of evidence of motive for altering election returns, and of opportunity for doing so, a conviction was not sustained merely by a comparison by the jury of the few words and figures alleged to have been altered, with the same words and figures written by defendant under abnormal conditions. — PEOPLE v. BUCKLEY, Cal., 47 Pac. Rep. 1009.

38. CRIMINAL LAW—Venue—Abortion.—Where an instrument to procure abortion is used in one county, and the woman dies in another, either county has jurisdiction, under Rev. St. 1894, § 1649 (Rev. St. 1881, § 1580), providing that, where a public offense is committed partly in one county and partly in another, jurisdiction is in either.—HAUK v. STATE, Ind., 46 N. E. Rep. 127.

39. DEED—Boundaries—Settlement.—A grantee in a deed describing the land as containing about a certain quantity cannot hold the grantor liable on his warranty as to a tract which was allotted to an adjoining owner by the establishment of a boundary line in which the grantor acquiesced, the plat of which was recorded before the grantor's conveyance.—ELMORE v. DAVIS, S. Car., 26 S. E. Rep. 680.

40. DEEDS — Conditional Limitations.—Title in fee-simple absolute is vested in the grantee by a deed to her and "her heirs and assigns forever, with *habendum* clause in the same terms, though the deed also contains a provision that, should such grantee "die leaving no lawful issue of her body," the lands conveyed shall go to others named "and their heirs forever," and though the deed contains the further proviso that the grantor and her husband "are to be allowed to reside at their present home on said land for and during her and his natural life, and shall have the right of making hers and his support thereon."—GLENN v. JAMISON, S. Car., 26 S. E. Rep. 677.

41. DEED—Description.—Where an administrator's deed and the proceedings in the probate court describe the land sold as the interest of decedent "in and to 80 acres" of a certain survey, and the evidence shows a deed to the decedent of a half interest in such a tract, described by metes and bounds and duly recorded, the description is not too indefinite to pass title.—HERMANN v. LIKENS, Tex., 39 S. W. Rep. 282.

42. DEED—Joint Tenancy.—The grantees in a deed were described as "K S and H S, her husband, and the survivor of them, in his or her own right, party of the second part." The granting clause was: "Unto said party of the second part, their heirs and assigns, forever." After the description were the words: "The conveyance herein is made to said grantee in joint tenancy." The *habendum* was: "Unto the said party of the second part, their heirs and assigns, forever." 1 Starr & C. Ann. St. p. 571, provides that no estate in joint tenancy shall be claimed under any conveyance unless the premises shall expressly be declared to pass not in tenancy in common, but in joint tenancy: Held, that the deed created an estate in joint tenancy.—SLATER v. GRUGER, Ill., 46 N. E. Rep. 235.

43. DEED OF TRUST — Appointment of Trustee — Res Judicata. — Where beneficiaries in a deed of trust appeared in a suit by the grantor to enjoin the trustee from selling under the deed, and asked judgment for the debt and a foreclosure of their lien, a decree refusing such relief on the ground of limitations is not a bar to a subsequent suit by the beneficiaries, after the trustee's death, for the appointment of a substitute trustee to execute the power of sale.—CONVERSE v. DAVIS, Tex., 39 S. W. Rep. 277.

44. DEED — Power of Sale. — A grantor, in one deed, conveyed specific land to his wife and minor children, and also all the property he was entitled to receive from his father's estate, authorizing the wife to sell the latter property for her own use and the use of the children, while another distinct power authorized her to sell "the property herein deeded to her for her own use, and for the use and benefit of" the children: Held, that the wife could not sell the interest of the children in the specific property.—ADAMS v. MAUERMANN, Tex., 39 S. W. Rep. 280.

45. DEEDS—Probate.—The fact that the acknowledgment and the privy examination of a wife voluntarily joining in a deed with her husband were taken prior to proof of execution of the deed by the husband, instead of thereafter, as required by Code, § 1256, was a defect in the probate merely, which did not render the deed void as between the parties.—BARRETT v. BARRETT, N. Car., 26 S. E. Rep. 691.

46. DIVORCE—Alimony—Arrest of Husband. — Under St. § 2124, providing that when a husband is about to remove himself and his property out of the State, or there is ground to suspect he will fraudulently convey or conceal his property, the wife may obtain the necessary orders for securing alimony, etc., without giving security, a wife may obtain an order for the arrest of the husband in such case without giving the bond required by Civ. Code, § 154, relating to provisional remedies. — ROBERTSON v. ROBERTSON, Ky., 39 S. W. Rep. 244.

47. DOWER — Allotment of Gross Sum. — Where it is impracticable to so divide property in the hands of a purchaser as to allot dower to the widow by metes and bounds, a gross sum, based on the value at the time of alienation, may be awarded her as a charge upon the property. — HOGG v. HENSLEY, Ky., 39 S. W. Rep. 247.

48. DRAINAGE — Power of Commissioners. — Where a drainage district has been legally organized, the commissioners have no power to change its boundaries except by a dissolution, under 3 Starr & C. Ann. St. p. 458, § 47 1-2, relating to the dissolution of drainage districts.—PEOPLE v. DRAINAGE COM'RS OF UNION DRAINAGE DIST. NO. 1, Ill., 46 N. E. Rep. 261.

49. ELECTION—Marking Ballots.—Under Pol. Code, § 1861, providing that; if one desire to vote a straight

party ticket, he may do so by making a cross at the head of the list representing his political party, and if he desire to vote for any candidates on any other list he shall make a cross opposite the name of such candidate; and section 1403, declaring void a ballot or parts of a ballot from which it is impossible to determine the elector's choice, but providing, if part of a ballot is sufficiently plain to gather therefrom the elector's intention, such part shall be counted, — a ballot with a cross at the head of the list representing a political party, and a cross opposite the name of a candidate in another list for an office for which there is no candidate in the first list, will be counted for such candidate and all candidates in the first list; as, while the provision for use of a cross to indicate choice is mandatory, that for putting cross opposite name of every candidate where a voter wishes to vote for candidates in more than one list is merely directory.—DICKERMAN V. GELSTHORPE, Mont., 47 Pac. Rep. 999.

50. EVIDENCE — Carriers—Declarations of Intending Passenger. — Declarations by plaintiff's intestate as to her intention to become a passenger on defendant's train, made an hour before the time of departure, and while she was engaged in her ordinary household duties, were not admissible as part of the *res gestæ*.—CHICAGO & E. I. R. CO. V. CHANCELLOR, Ill., 46 N. E. Rep. 269.

51. FORCIBLE ENTRY AND DETAINER.—Under Rev. St. ch. 57, § 2, cl. 3, providing that the person entitled to possession of lands may be restored thereto by forcible entry and detainer proceedings "when entry is made into vacant or unoccupied lands without right or title," the action will not lie against one who under a deed enters into lands then in the actual and exclusive possession and occupancy of his grantor, though such grantor or a remote grantor entered into the same when vacant or unoccupied, without right or title.—FITZGERALD V. QUINN, Ill., 46 N. E. Rep. 287.

52. GUARANTY — Evidence. — In an action upon a written guaranty parol evidence is admissible to show that plaintiff sold and delivered goods on the faith of the guaranty.—WORCESTER COAL CO. V. UTLEY, Mass., 46 N. E. Rep. 114.

53. GUARDIAN AND WARD — Loss of Funds Deposited. —To entitle a guardian to protection from a loss of funds of his ward by the failure of a bank in which he deposited them, the deposit must clearly show that it was made by him as such guardian, and the letters "Guar.," after his name in a certificate of deposit, are insufficient. — O'CONNOR V. DECKER, Wis., 70 N. W. Rep. 287.

54. GUARDIAN AND WARD—Use of Principal of Estate. —Where a guardian expended for his ward a sum in excess of the income of her estate, which was allowed by the probate court, though it had not directed such expenditure, on his account being surcharged with such excess he should be charged with 6 per cent. interest only.—CAMPBELL V. CLARK, Ark., 39 S. W. Rep. 362.

55. HIGHWAYS—Injury by Defects.—Where the buggy in which plaintiff was riding ran into a ditch across the highway, throwing out the driver, and causing the horses to run away, and further down the highway plaintiff was thrown out and injured, the ditch was the proximate cause of the injury to plaintiff. — DONOHUE V. TOWN OF WARREN, Wis., 70 N. W. Rep. 805.

56. INJUNCTION — Parties.—An injunction will not be granted when the parties who are directly affected by its operation are not before the court. Where the record shows that the defendants in an action for an injunction are only nominal parties, and that the real parties in interest have not been brought into court, and where the relief sought would bar the absent parties from their day in court, the court should refuse to grant the injunction, although the defendants who are before the court do not raise the question of a defect of parties, either by demurrer or answer, as required by sections 89, 91, Code. — WALKER V. CAMBERN, Kan., 47 Pac. Rep. 980.

57. INSOLVENCY — Preference for Wages. — Wages earned within three months anterior to a "petition for insolvency" do not come within Code, art. 47, § 15, giving preference to wages contracted not more than three months anterior to an "adjudication of insolvency."—ROBERTS V. EDIE, Md., 36 Atl. Rep. 820.

58. INSURANCE—Breach of Warranty.—In an application for insurance warranting the literal truth of the statements therein, and made a part of the policy, which provided for forfeiture for breach of warranty, a statement that the insured resided at K, when he in fact resided in the country 12 miles from K, will avoid the contract. — HUTCHISON V. HARTFORD LIFE & ANNUITY INS. CO., Tex., 39 S. W. Rep. 325.

59. JUDGMENT AGAINST MARRIED WOMAN — Separate Estate.—The separate estate of a married woman cannot, after coverture ceases, be subjected to a general judgment obtained against her during coverture.—WOODFOLK V. LYON, Tenn., 39 S. W. Rep. 227.

60. JUDICIAL SALE — Purchaser — Claim. — Where an assignee in insolvency at a sale of land covered by a mortgage stated that the taxes thereon would be paid by the estate, evidence of such statements may be received to determine the rights of a person who purchased relying thereon. — TAYLOR V. WILCOX, Mass., 46 N. E. Rep. 115.

61. LANDLORD AND TENANT — Lien on Future Property.—An equitable lien in favor of the lessor of a sugar house, on future bounties paid to the lessee for sugar there manufactured, may be created by stipulation in the lease.—BURDON CENTRAL SUGAR REFINING CO. V. FERRIS SUGAR MANUFG. CO., U. S. C. C., E. D. (La.), 78 Fed. Rep. 417.

62. LIBEL—Punitive Damages. — Where, in an action for libel, the charge discloses repeated statements that there was no actual malice on the part of the defendants, and, if they were liable for punitive damages, it was by reason of implied malice because of a reckless publication of the libel, error in charging that the jury might find actual malice from defendant's neglect to investigate the truth of the libel before publication was harmless. — SMITH V. MATTHEWS, N. Y., 46 N. E. Rep. 164.

63. LIMITATION OF ACTIONS — New Cause of Action.— Where the original declaration failed to allege any cause of action whatever, a subsequent amended declaration, setting up negligence of defendant, states a new cause of action, within the rule that a new cause of action distinct from that averred in the declaration cannot be pleaded by amendment after the statute of limitations has run. — EYLENFELDT V. ILLINOIS STEEL CO., Ill., 46 N. E. Rep. 266.

64. MANDAMUS — Pleading. — The alternative writ of *mandamus* and return are governed by the same rules as pleadings in other civil actions, and allegations of the writ, not denied in the return, are admitted.—STATE V. MAYOR, ETC., OF CITY OF OSHKOSH, Wis., 70 N. W. Rep. 300.

65. MARRIED WOMAN—Disability of Coverture.—Since the disability of coverture can be removed only in the way prescribed by statute, a married woman may plead coverture in bar of contracts made in her behalf by one whom she has orally appointed and held out to the public as her agent.—TROY FERTILIZER CO. V. ZACHRY, Ala., 21 South. Rep. 471.

66. MASTER AND SERVANT—Assumption of Risk.—An experienced freight brakeman, having a general familiarity with the road, while ascending, in daylight, in the course of his usual employment, a ladder of a box car of ordinary width, was struck by a similar car standing on a spur used for the storage of cars, of which spur, and of the purpose of which, he was aware: Held, that he assumed the risk.—VINING V. NEW YORK, ETC. R. CO., Mass., 46 N. E. Rep. 117.

67. MASTER AND SERVANT — Assumption of Risk.—An experienced brakeman, having knowledge of a notice

requiring extra care to be used to prevent being caught between lumber projecting beyond the end of a car, assumes the risk of injury if he attempts to make a coupling between the engine and a car loaded with lumber projecting beyond the end (which was not an unusual manner of loading cars), even where the drawhead of the tender was shorter by several inches than the drawhead of ordinary freight cars.—NASH v. CHICAGO, ETC., RY. CO., Wis., 70 N. W. Rep. 298.

68. MASTER AND SERVANT—Contracts.—An agreement of defendant to furnish plaintiff with "permanent employment," at stipulated wages, if he would give up his business, and enter defendant's service in the same occupation, was a contract to employ plaintiff only so long as defendant had work to do in that occupation, and so long as plaintiff could do the work satisfactorily, and hence was not void for indefiniteness.—CARNIG v. CARR, Mass., 46 N. E. Rep. 117.

69. MASTER AND SERVANT—Contract of Hiring.—In an action for breach of a contract to employ plaintiff as machine agent and inventor, which fixed a definite compensation, and provided that all inventions should belong to defendant, the value of a particular invention was immaterial on the question of damages.—PAPE v. LATHROP, Ind., 46 N. E. Rep. 154.

70. MASTER AND SERVANT—Defective Machinery.—A master is not obliged to have molds used in a foundry inspected for temporary dampness, where the molds were small and numerous, and the danger transitory.—WHITTAKER v. BENT, Mass., 46 N. E. Rep. 121.

71. MASTER AND SERVANT — Fellow-servants — Employer's Act.—Under St. 1887, ch. 270, § 1, ch. 2, making an employer liable for the negligence of a servant intrusted with and exercising superintendence, a street-railway company is not liable for the negligence of its paint shop superintendent while acting as motorman, in shifting cars, whereby a shop employee, who was assisting in the work by guiding the trolley, was injured.—BRITTAIN v. WEST END ST. RY. CO., Mass., 46 N. E. Rep. 111.

72. MASTER AND SERVANT—Relation.—A mechanic in the general employ of defendant was sent by defendant, at the request of C, to repair certain machinery of C. He was entirely under C's direction, though C relied largely on his skill and experience: Held that, in making the repairs, he was a servant of C, and not of defendant.—SAMUELIAN v. AMERICAN TOOL & MACHINE CO., Mass., 46 N. E. Rep. 98.

73. MASTER AND SERVANT—Wrongful Discharge.—Retention of a servant in the service and payment of wages to him without protest, after knowledge of defective work done by him, is *prima facie* evidence of a waiver of the right to discharge him, or deduct from his wages on that account.—TICKLER v. ANDRAE MANUFG. CO., Wis., 70 N. W. Rep. 292.

74. MORTGAGE—Assignment—Lien.—The assignee of a recorded mortgage on land which was conveyed by the mortgagor to the mortgagee after the assignment has a lien as against a *bona fide* purchaser from the mortgagee, though the purchaser's deed was recorded before the record of the assignment.—CURTIS v. MOORE, N. Y., 46 N. E. Rep. 168.

75. MORTGAGE — Collateral Security.—Where a note payable to the order of the maker, and a trust deed securing it, are transferred as collateral for other notes of the transferror held by the transferee, in a bill to foreclose, the decree may be only for the amount actually due from defendant to complainant.—STANLEY v. CHICAGO TRUST & SAVINGS BANK, Ill., 46 N. E. Rep. 278.

76. MORTGAGES — Possession of Mortgagee.—Mortgagees who have taken possession before foreclosure are not "persons holding possession under color of title in good faith," within Code, § 2706, who are exempted from responsibility for damages or rent for more than one year before the commencement of a suit for the possession of the premises.—KEITH v. MCLAUGHLIN, Ala., 21 South. Rep. 483.

77. MORTGAGE — Receiver — Foreclosure.—Where mortgaged property has been sold under a judgment against the mortgagor, and the purchaser is in possession and is solvent, a receiver will not be appointed, on the application of the mortgagee, to take possession of the property, and collect the rents and profits, pending a foreclosure.—WARREN v. PITTS, Ala., 21 South. Rep. 494.

78. MORTGAGE — Rights of Junior Mortgagee.—A junior mortgagee does not discharge indorsers on his mortgage note by failing to set up and foreclose the mortgage in a suit to foreclose the senior mortgage, to which he was made a party.—CARVER v. STEELE, Cal., 47 Pac. Rep. 1007.

79. MORTGAGE—Satisfaction.—A mortgagee, who took a note and a mortgage executed by both husband and wife, cannot, though the mortgaged property was owned by the wife alone, dispute the husband's right to join with the wife in an action for the statutory penalty for a failure to enter a satisfaction of the mortgage after payment and request.—THOMASON GROCERY CO. v. MITCHELL, Ala., 21 South. Rep. 461.

80. MORTGAGE TO SECURE BONDS — After-acquired Property.—That a mortgage by a water-works company to a trustee to secure an issue of bonds recites a purpose to extend the plant, and that it also contains a clause covering future-acquired property, and a covenant for further assurances, does not impose on the trustee a continuing duty to the extent of requiring it to take notice of what the mortgagor does with the money, or of the property which it purchases.—NATIONAL WATER-WORKS CO. OF NEW YORK v. KANSAS CITY, U. S. C. C., W. D. (Mo.), 78 Fed. Rep. 428.

81. MUNICIPAL CORPORATION — Control of Streets.—The legislature may delegate to a city control over public streets within its limits.—CITY COUNCIL OF MONTGOMERY v. PARKER, Ala., 21 South. Rep. 452.

82. MUNICIPAL CORPORATION—Liabilities for Defective Sewers.—A city is liable to an individual for injury received from an unsafe condition of the street, whether arising from construction of sewer according to an adopted plan, and its failure to remedy it, or from failure to repair defects arising after construction of the sewer.—CITY OF CHICAGO v. SEBEN, Ill., 46 N. E. Rep. 244.

83. NATIONAL BANKS — Shareholders—"Pledgee" of Shares.—One who appears on the official list of the names and residences of the shareholders of a national bank only as "pledgee" of a given number of shares of the capital stock of such bank, nothing else appearing, is not a shareholder, within the meaning of Rev. St. § 5151, and is not subject to the liability imposed by that section upon shareholders of national banks.—PAULY v. STATE LOAN & TRUST CO., U. S. C. C., 17 S. C. Rep. 465.

84. NATURALIZATION — Issuance of Certificate.—The administration of the oaths and issuing of a certificate to an applicant for naturalization by a court having jurisdiction of such applications constitute a judgment of admission to citizenship, which is conclusive as to the existence of the necessary facts and the *status* of the applicant; and such certificate cannot be set aside upon the ground that the facts were falsely represented to the court.—UNITED STATES v. GLEASON, U. S. C. C., E. D. (N. Y.), 78 Fed. Rep. 396.

85. NEGOTIABLE INSTRUMENTS — Parol Evidence.—In an action upon a note by the payee against the sole makers thereof, parol evidence is inadmissible to show that the makers executed and delivered the notes as collateral security only.—MOORE v. PRUSSING, Ill., 46 N. E. Rep. 184.

86. NOTARY PUBLIC — Contempt of Court — Punishment.—A notary public, with jurisdiction of a justice of the peace, without making himself or sureties on his bond liable to civil action, can punish for contempt a bystander, who, when the notary intimated that he should find guilty a person being tried before him for assault, interrupted with a statement that he knew

two persons who saw the affair, and then refused to disclose their names.—COLEMAN v. ROBERTS, Ala., 21 South. Rep. 449.

87. NUISANCE — Stock Yards.—A nuisance which affects a place where the public has a legal right to go, and where the members thereof congregate, or where they are likely to come within its influence, is a public nuisance.—CITY OF BURLINGTON v. STOCKWELL, Kan., 47 Pac. Rep. 988.

88. OFFICE AND OFFICER — Abolishment — Officer de Facto.—There can be no *de facto* officer in case of an office which has been abolished by statute.—IN RE QUINN, N. Y., 46 N. E. Rep. 175.

89. OFFICERS — Vacancy — Title.—The declaration of the house of delegates on a contest that the election of a judge of orphans' court was illegal did not create a vacancy, within Const. art. 4, § 40, declaring that judges of the orphans' court shall be elected, and that in case of a vacancy the governor shall appoint one who shall hold for the residue of the term.—IJAMS v. DUVALL, Md., 36 Atl. Rep. 819.

90. PARTNERSHIP—Dissolution—Liability for Debts.—A retiring partner is liable for the debts of the firm to a creditor having actual knowledge that, under the terms of the dissolution, the other partner had assumed to pay the debts, though the creditor had attached the goods of such other partner, and subsequently had released the attachment.—NATIONAL CASH REGISTER CO. v. BROWN, Mont., 47 Pac. Rep. 995.

91. PAYMENT—Mistake.—An installment of interest paid twice by mistake, because not indorsed on the note when first paid, can be recovered back at law.—HUMMEL v. FLORES, Tex., 39 S. W. Rep. 309.

92. PHYSICIANS AND SURGEONS—Malpractice.—In order to recover damages from a physician or surgeon for want of proper care and skill, the plaintiff must show, both that the defendant was unskillful or negligent, and that injury was produced by his want of skill or care.—EWING v. GOODE, U. S. C. C., S. D. (Ohio), 78 Fed. Rep. 442.

93. PLEDGE—Non-delivery.—S, the owner of a majority of the stock of a mining company and of a furnace company, caused the furnace company to issue, without consideration, but with no fraudulent intent, storage warrants in the usual form of warehouse receipts on the iron in its yards in favor of the mining company, but there was no actual delivery of nor agreement to purchase the iron. Held, that the delivery of the warrants by S, as president of the mining company, to a bank, which took them in good faith, as collateral security for a loan, gave the bank no rights superior to a creditor who sold the iron under a judgment for advances to the furnace company, the warrants being insufficient as contracts of pledge because of non-delivery of the iron.—GEILFUSS v. CORRIGAN, Wis., 70 N. W. Rep. 306.

94. PRINCIPAL AND AGENT — Authority of Agent.—Where a general agent for loaning, collecting, and reloaning his principal's money takes a note payable to himself from a borrower, in payment of a matured note of the latter, without the knowledge or ratification of the principal, the borrower remains liable to the principal.—EVERTS v. LAWTHER, Ill., 46 N. E. Rep. 233.

95. PRINCIPAL AND AGENT—Brokers—Compensation.—An agent for the solicitation on commission of orders for the output of another's business was not entitled to compensation merely because he performed services which "tended" to obtain orders, or because he introduced to his principal parties, who subsequently gave orders.—AYRES v. THOMAS, Cal., 47 Pac. Rep. 1013.

96. PRINCIPAL AND AGENT—Brokers—Good Faith.—A broker employed to sell stock forfeits his commission where, after finding a purchaser, he agrees with him and another person that the latter shall buy the stock in order that it may be obtained at a less price, and that the real purchaser shall not be disclosed to the owner.—HAFNER v. HEBRON, Ill., 46 N. E. Rep. 211.

97. PRINCIPAL AND SURETY—Liability.—Sureties on a bond to dissolve an attachment, signed for the principal without authority, are not liable, though they had reasonable cause to know it was so signed, they being in fact ignorant thereof, and not having willfully or deliberately ignored the facts.—DOLE BROS. CO. v. COSMOPOLITAN PRESERVING CO., Mass., 46 N. E. Rep. 105.

98. PROCESS—Service by Publication.—An action to cancel a deed of real and personal property located in the county in which the action is brought is an action "for the recovery of real property, or of an estate or interest therein, or for the determination in (some) form of such right or interest" (Gen. St. § 3040), and hence, being an action *in rem*, may be prosecuted against a non-resident by publication.—ROBINSON v. KIND, Nev., 47 Pac. Rep. 977.

99. RAILROAD COMPANY — Construction of Road.—Plaintiff sued for damages to lands resulting from the construction of a railroad. The road was built in 1889; plaintiff acquired title in the lands in 1890; and the action was begun in 1893, apparently for continuing damages for three years next preceding, but, without objection, the issues submitted covered only permanent damage. There was no evidence that the damage was simultaneous with the construction of the road, but it appeared that it resulted from the gradual filling up of plaintiff's drains by deposits discharged from defendant's ditches: Held, that it would not be presumed that the permanent damage occurred before plaintiff's ownership.—BEACH v. WILMINGTON & W. R. CO., 26 S. E. Rep. 708.

100. RAILROAD COMPANY—Killing Stock.—Where the evidence in an action for killing stock left it doubtful whether the stock entered on the right of way through defects in the fences, or through a gate erected for plaintiff's benefit, and left under plaintiff's control, it was error to render judgment for plaintiff.—MISSOURI, K. & T. RY. CO., OF TEXAS v. JOHNSON, Tex., 39 S. W. Rep. 323.

101. RAILROAD COMPANY—Negligence.—To run a train at a speed of 25 miles an hour past a depot on a track across which passengers for a train of another railroad company have to go is negligence.—CHICAGO, ST. P. & K. C. RY. CO. v. RYAN, Ill., 46 N. E. Rep. 208.

102. RECEIVERS—Taxes.—A tax against a bank, based on the amount of taxable property shown by return of its cashier, cannot be questioned by its receiver, any more than by it, though it had no taxable property; it not appearing that it was insolvent when return was made and tax levied, or that the cashier acted in bad faith.—HAMACKER v. COMMERCIAL BANK, Wis., 70 N. W. Rep. 295.

103. REMOVAL OF CAUSES—Federal Corporations and Receivers.—A suit against a corporation of the plaintiff's State, with the Union Pac. Ry. Co., a corporation chartered by congress, and its receivers appointed by a federal court, such suit being also brought against the receivers, without leave, by virtue of the federal statute, is a suit arising under the laws of the United States, and, if brought in a State court, may be removed to a federal court.—LUND v. CHICAGO, R. I. & P. RY. CO., U. S. C. C., D. (Neb.), 78 Fed. Rep. 385.

104. SALES—Fraud—Rescission.—A purchase of goods with intent at the time not to pay for them is such a fraud as entitles the seller to rescind, though there were no false representations.—REAGER v. KENDALL, Ky., 39 S. W. Rep. 257.

105. SALES—Waiver of Defects.—One who buys coal for future delivery, and receives it with knowledge that it is not of the quality sold, or could by inspection on delivery discover its quality, cannot afterwards claim a deduction in the price.—BANNON v. ST. BERNARD COAL CO., Ky., 39 S. W. Rep. 252.

106. SCHOOL DISTRICTS—Formation of New District.—Sand. & H. Dig. § 6992, providing that on the organization of a new school district from territory of an existing district, in case there shall be a surplus fund on hand at the time of the formation of the new district,

it shall be entitled to a proportionate part of such fund, does not apply to a tax for the expenses of the current year voted by the old district, but not levied at the time of the formation of the new district, and which the directors of the old district are required by law to expend for the purposes for which it was voted, but only to any surplus which may remain after such purposes have been carried out.—SCHOOL DIST. NO. 15 v. SCHOOL DIST. OF WALDRON, Ark., 39 S. W. Rep. 264.

107. SCHOOLS — Reasonable Regulations—Rights of Parents.—Plaintiff sent her daughter to defendant's school, agreeing to be bound by the conditions of the catalogue, which provided that scholars should not be absent from school except at regular recesses: Held, that defendant was not bound to allow plaintiff's daughter to remain in the school unless with the understanding that she should not be absent during term time without permission of the officers thereof.—CURRY v. LASELL SEMINARY CO., Mass., 46 N. E. Rep. 110.

108. SET-OFF — Partnership.—A mercantile creditor entered into partnership with one who became a partner in the debt, and the debtor thereafter purchased of the partnership on credit: Held, in an action by the firm on the entire account, that the debtor could not set off a sum due him from the original creditor at the time the partnership was formed, except as against the debt as it stood at that time.—TILLIS v. MCKINNA, Ala., 21 South. Rep. 465.

109. SLANDER—Words Spoken of Employee.—In an action for slander, where the defendant claims that the words spoken were privileged, because spoken by him in good faith, as a stockholder in a corporation, to an officer thereof, concerning one of its employees, it is competent for the defendant to testify that what he said was upon information, without malice, in the belief that it was true, to state any relevant part of the conversation in the course of which he uttered the alleged slander, including statements made by him of the nature of the information he claimed to have, and also to testify to the purport of an entry in a book, claimed to be the basis of his statements, without producing the book itself.—SCULLIN v. HARPER, U. S. C. C. of App., Seventh Circuit, 78 Fed. Rep. 460.

110. TAXATION — Foreign Corporations. — A foreign corporation, by becoming a special partner in, and contributing to the capital of, a limited partnership in New York, which is engaged in importing, and has the sole sale in the United States of the manufactures of the corporation made in the foreign country, is "doing business" in the State, within Laws 1880, ch. 542, declaring it, in such case, taxable on the amount of its capital stock employed within the State, which is the amount of its contribution to the capital of the partnership.—PEOPLE v. ROBERTS, N. Y., 45 N. E. Rep. 161.

111. TENDER — Sufficiency. — Where a tender is made and kept good by bringing it into court, and it is not accepted or taken out of court, and it is found on the trial that a larger sum is due, it operates as a payment on the sum finally recovered. — MARTIN v. BOTT, Ind., 46 N. E. Rep. 151.

112. TRIAL—Remarks of Counsel.—Improper remarks of counsel are not ground for reversal where the only objection by opposing counsel was that "I desire the record to show that I object to these remarks," and no ruling by the court was sought or made. — WEST CHICAGO ST. R. CO. v. ANNIS, Ill., 46 N. E. Rep. 264.

113. TRUST.—An order of the probate court, made in reference to a minor's estate, that the guardian "have leave to expend a sum not to exceed one-third of the amount recovered in a right of action arising out of the personal injuries of the minor," as attorney's fees, does not create a trust fund for the benefit of the attorneys who recovered the judgment. — DOUGHERTY v. HUGHES, Ill., 46 N. E. Rep. 229.

114. TRUST — Accounting. — A bill alleged that complainant, being in debt, assigned as security his stock of goods by bill of sale to one agreeing to indorse his notes, with the understanding that complainant should continue the business; that, on payment of the debts indorsed by defendant, the remaining stock of goods was to be returned to the complainant; that defendant turned plaintiff out of the business, in violation of the agreement, and sold the stock, and failed to pay off the indebtedness; and asked for an accounting: Held, that a complete legal trust was established, so as to entitle complainant to an accounting. — ROGERS v. JOHNSON, Ala., 21 South. Rep. 477.

115. VENDOR'S LIEN. — Where a balance due from a husband and wife on a contract for the purchase of a homestead was paid by a third person, to whom the property was conveyed, and who conveyed it to the husband, a vendor's lien retained in the deed securing notes taken from the husband for the money advanced is valid.—CLARK v. BURKE, Tex., 39 S. W. Rep. 306.

116. WILL—Costs — Probate.—A person named as executrix in a will which she in good faith propounds for probate, but which is declared invalid, may recover from the estate her costs and reasonable attorney's fees, though she was the only person to be benefited by establishing the will.—LASSITER v. TRAVIS, Tenn., 39 S. W. Rep. 226.

117. WILL—Death of Devisee without Issue.—Where testator devised lands to his daughter for life, and at her death to the heirs of her body, subject to the right of the surviving husband to a life interest therein, the husband's life estate, on the death of the daughter without surviving children, was not defeated by a subsequent clause providing that, should any of the "children herein named die without issue, the property shall revert to the surviving brothers and sisters, or their heirs." — HATCHETT v. HENDERSON TRUST CO., Ky., 39 S. W. Rep. 234.

118. WILL—Rule in Shelley's Case.—Under the law of real property prevailing in the District of Columbia, as declared by the courts of Maryland and of the district, though the rule in Shelley's Case is recognized as one of property, yet, if there are explanatory and qualifying expressions from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield, and the latter will prevail; and where there is a devise to a person for life, with remainder to the heirs begotten of his body, and their heirs and assigns, forever, the first taker has an estate for life, and his children take an estate in fee, by purchase. — DE VAUGHN v. HUTCHINSON, U. S. S. C., 17 S. C. Rep. 461.

119. WILL—Foreign Wills — Bonds.—A provision in a will authorizing a certain court to grant letters testamentary to a person named, without bond, does not authorize a court of another State, on an ancillary probate of the will, to grant letters to such person without bond.—KEITH v. PROCTOR, Ala., 21 South. Rep. 502.

120. WILLS — Posthumous Children.—Testator made his will the day before his death, whereby he gave all his estate to his wife, and directed that she should have full power to sell and convey all property, the same as he himself could have done. At the time, testator had two young children for whom no provision was made: Held, that the intention of testator to disinherit an after-born child (1 Starr & C. Ann. St. p. 883, ch. 39, § 10) was shown, so as to entitle the wife to the entire estate as against such a child.—HAWHE v. CHICAGO & W. I. R. CO., Ill., 46 N. E. Rep. 246.

121. WITNESSES — Impeachment. — When a witness testifies to a fact, and the adverse party attempts to show that he made different statements in regard to such fact, the party introducing the witness may prove that he made statements to others corresponding with his testimony at or near the time of the transaction.—KEMBALL v. STATE, Tex., 39 S. W. Rep. 297.

122. WITNESS—Judge—Competency.—A probate judge cannot testify to establish an instrument as a will in proceedings before him for its probate. — ESTES v. BRIDGFORTH, Ala., 21 South. Rep. 512.